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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930. No. 641.

PHILADELPHIA WAREHOUSING AND COLD STORAGE COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND REX & CO., INC., ET AL.

BRIEF FOR APPELLANT.

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Supreme Court of the United States.

October Term, 1930. No. 641.

PHILADELPHIA WAREHOUSING AND COLD STORAGE COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND REX & CO., INC., ET AL.

BRIEF FOR APPELLANT.

OPINION OF THE COURT BELOW.

The opinion of the District Court of the United States for the Eastern District of Pennsylvania, is reported in Volume 44 FEDERAL REPORTER, Second Series, page 379 (Record 30).

STATEMENT OF THE CASE.

This is an Appeal by the PHILADELPHIA WAREHOUSING AND COLD STORAGE COMPANY from the decree of the District Court of the United States for the Eastern District of Pennsylvania, dismissing its Bill in Equity which prayed for an injunction to restrain the en-

forcement of a CEASE AND DESIST ORDER of the INTERSTATE COMMERCE COMMISSION issued on the Complaint of REX & COMPANY, INC., ET AL. against the READING COMPANY wherein they prayed that a certain contract between the PHILADELPHIA WAREHOUSING AND COLD STORAGE COMPANY, and the READING COMPANY was unjustly discriminatory to the complainants, and was a device to pay rebates to the Appellant as a shipper of the merchandise loaded and unloaded by it into and from freight cars of said carrier.

A copy of the said Complaint will be found in the printed Record page 120.

The contract between PHILADELPHIA WAREHOUSING AND COLD STORAGE COMPANY and the READING COMPANY was entered into November 4, 1898. This contract has been in force from that time up to the present time, a period of over thirty-three years.

A copy of the contract will be found in the printed Record, page 683.

A large amount of testimony was taken before the Examiner of the Interstate Commerce Commission who filed a report wherein he recommended a finding by the Commission that the contracts were discriminatory, and that the warehouse company, by reason of the dominion which it acquired in unloading and loading freight cars was to be deemed a shipper of the merchandise, and that the payment of an allowance for the services rendered was in effect the payment of a rebate.

On exceptions to this report being filed, Division 3 of the Interstate Commerce Commission sustained the report, a copy of which will be found (Record, page 142). In this report, PORTER, Commissioner, says at page 150:

> "Following McCORMICK WAREHOUSE CO. vs. PENNSYLVANIA R. CO., supra, and upon this record, we find that the practice of defendants in making allowances to the contract warehouses in connection

with the loading or unloading of package freight at Philadelphia as aforesaid, and refusing to make similar allowances to complainants for performing similar services results in unjust discrimination, in undue preference of the contract warehouses, and in undue prejudice to complainants. The record discloses that these allowances are nothing more than a device to attempt to lend legality to the payment of rebates to the contract warehouses. It is apparent that the unjust discrimination and undue prejudice can lawfully be corrected only by terminating the allowances. Defendants will therefore be required to cease and desist from publishing or making such discriminatory and preferential allowances. The Pennsylvania and the Baltimore & Ohio will also be required to cancel their tariff provisions which make the facilities of the contract warehouses a part of the respective station facilities of these defendants at Philadelphia."

The Interstate Commerce Commission on December 28, 1929, issued its cease and desist order effective February 10, 1930 (Record page 151). Afterwards made effective February 25, 1930 (Record page 177), whereupon the appellant filed its bill in equity in the District Court of the United States for the Eastern District of Pennsylvania against the United States of America and the Interstate Commmerce Commission, wherein is prayed among other things that the Court should summon a Statutory Court in accordance with the provisions of the Act of Congress, approved October 22, 1913, 38 Statutes 220, U. S. Code Title 28, Section 47, and that the execution of said cease and desist order be stayed until the further order of the COURT (Record page 83).

On the presentation of said bill in equity to the Hon. J. Whitaker Thompson, Judge in said court he made an order dated February 17, 1930, that United States Circuit Judge Victor B. Woolley, and the United States District Judge,

William H. Kirkpatrick be called to his assistance to hear and determine said application for a temporary stay and ordered the hearing thereof before said Court on 21 day of February, 1930, at 10.00 o'clock at Philadelphia (Record page 841).

The Court by order made February 20, 1930, substituted the Honorable O. B. Dickinson, United States District Judge in place of the Honorable William H. Kirkpatrick. On February 21, 1930, the Court made an order fixing March 26, 1930, for hearing on the merits. On March 27, 1930, decree filed amending decree of February 17, 1930, by substituting the Honorable Joseph Buffington, Circuit Judge, in place of the Honorable Victor B. Woolley. The said cause was heard by the said Court on March 26, 27 and 28, 1930.

On April 15, 1930, decree filed continuing temporary stay of order of Interstate Commerce Commission. On October 8, 1930, the Court dismissed Appellant's Bill in Equity in an opinion by THOMPSON, J., concurred in by DICKINSON, J., BUFFINGTON, C. J., dissenting.

(Printed Record page 30).

On appellant's petition for appeal with supersedeas, the Court in a per curiam, filed November 19, 1930, granted such order fixing appeal bond in the sum of $2,000. which bond was entered and approved. The said appeal is now pending for hearing in this court.

ANALYSIS OF THE CONTRACT.

1. The Contract dated November 4, 1898, between the PHILADELPHIA & READING RAILROAD COMPANY and the PHILADELPHIA WAREHOUSING & COLD STORAGE COMPANY superseded the Contract dated June 2, 1891, between the PHILADELPHIA & READING COMPANY and the Warehouse Company.

2. The Railway Company agreed to bargain, sell and convey unto the Warehouse Company in fee simple, free of encumbrances, property at the Northwest Corner of Delaware Avenue and Noble Street, Philadelphia, reserving for the use or occupation of the Railway Company the platform and tracks now on said property. The Warehouse Company agreed to pay to the Railway Company the sum of $23,750.00.

3. The Warehouse Company was to commence within sixty (60) days from delivery of the Deed, to erect on the said lot at its own expense a brick building eight stories in height, of permanent character. The space below the second floor shall be twenty-one (21) feet clear above the level of the tracks of the Railway Company, and shall be occupied by the tracks and by the platform of the Railway Company; the other seven stories to be used by the Warehouse for the purpose of its own business.

4. The Building shall be supported by iron and steel columns, the first floor to remain open and appropriated for the tracks of the Railway Company and the platform, so constructed as to allow reasonable methods of access by the Warehouse Company for persons and property to the upper floors of the building, etc. etc.

5. Upon the delivery of the Deed from the Railway Company to the Warehouse, and upon the payment by the Railway Company to the Warehouse of the sum of $23,750.00, the Warehouse Company will convey unto the Railway Company the lot or piece of ground heretofore conveyed by the Railway Company to the Warehouse Company, reserving unto the Warehouse Company the right to maintain and operate for and during the term of 99 years from the 4th day of November, 1898, the new storage warehouse to be erected.

6. The Warehouse Company shall pay to the Railway Company during the continuance of the Contract for maintenance and operation of the new storage warehouse, the sum of $500 per annum from date of the completion of the Building, the payments to be made on the 4th day of November of each year. In addition shall pay and discharge all Taxes which shall be levied on the premises, or any improvements thereon, except the sum of $296.00, the rate of taxation now assessed upon the premises which shall be paid by the Railway Company.

7. The Warehouse Company to keep and maintain at its own expense the new storage warehouse in good condition, and to maintain at all times sufficient force, labor and appliances to promptly and expeditiously handle, receive and deliver merchandise to the full capacity of said storage house, and to load and unload all cars free of the expense to the Railway Company.

In case of the destruction of the Warehouse by fire or accident, the Warehouse Company shall not be obliged to rebuild the same unless it elects to do so, and shall notify the Railway Company of its election within ninety (90) days after said destruction, and in case it is rebuilt, the terms and conditions of the Contract to apply to the re-constructed warehouse.

8. The Warehouse Company to pay to the Railway Company when Merchandise shall be delivered by it to the Warehouse Company, weekly, all freights and charges, and until the charges are re-paid and until the same are collected from the actual consignees or owners, shall be entitled to the benefit of a lien on said Merchandise, and shall have the right and privilege to enforce the same in the name of the Railway Company, to the use of the Warehouse Company, and the Warehouse Company shall keep up policies of Insurance sufficient to cover all property delivered to the

Warehouse by the Railway Company during a period of two (2) days in respect to Merchandise requiring cold storage, and in other respects to store merchandise for a period of ten (10) days, and to apply the insurance money to the payment of claims for such loss or damage of merchandise.

9. The Contract not to be assigned without the written consent of the Railway Company.

10. The Contract to run for a period of 99 years, and at the end of the period of 99 years, the Warehouse Company shall have the option to lease the Warehouse for a further period of 99 years at a rental which shall be determined by mutual agreement, but Warehouse Company in the event of its exercising the option to continue for 99 years, to give six (6) months' Notice prior to the expiration of the first period of ninety-nine (99) years.

11. The Railway Company to deliver to the Warehouse Company for general storage and warehousing, all consignments of freight which it may find necessary or desirable to store in other than its own warehouse, and to deliver to it for cold storage and warehousing all consignments of Dairy and other products such as eggs, butter, cheese, poultry, etc. as can be controlled by it, and to make deliveries upon the tracks in the immediate vicinity of the platform of the Railway Company. Merchandise requiring cold storage shall be entitled to free storage for a period of two (2) days, and all other merchandise shall be entitled to free storage for a period of ten (10) days. The loading and unloading of cars at the Railway platform to be done by the Storage Company. The Railway Company appoints the *Storage Company its Agent and Warehouseman for such merchandise delivered by the Railway Company, such agency to extend only to the receipt, storage and delivery of consignments from Railway Company and to the collection of freight and charges thereon. The Agency shall not be taken to relieve*

the Warehouse Company from its liabilities as a Warehouseman, nor from Claims for loss or damage which may arise by reason of its own acts. In case the Warehouse Company shall not furnish room, the Railway Company to contract with others for such additional space.

12. The Railway Company to pay to the Warehouse Company as terminal allowance for facilities afforded and services rendered (that is to say for receiving, handling, free storage and insurance) the sum of 50¢ per Ton gross or net according to its classification, for every ton of merchandise requiring cold storage received from the Railway Company and stored by the Warehouse Company, and the sum of 30¢ per Ton for each and every ton of other merchandise not requiring cold storage. Payments of all amounts to the Warehouse Company shall be made by the Railway Company, before the 15th of each month, provided that the payments shall not be made by the Railway Company as to merchandise transported by it for which it only receives a switching or transfer service to or from other lines, or to and from other warehouses, in which case the Warehouse Company shall be at liberty to decline to receive such consignments.

This agreement is binding upon the respective Successors and Assigns, and is taken to supersede the Contract between the Warehouse Company and the PHILADELPHIA & READING RAILROAD COMPANY, which shall continue in effect so long as the Warehouse Company shall continue to maintain and operate the storage warehouse so to be erected, and that the Storage Warehouse shall make the Consignees or Consignors no higher charge for services rendered in handling, receiving, storing or shipping merchandise than are charged for the time being for similar services, by other Railroad Warehouses in the City of Philadelphia, unless the consent of the Railway Company to make higher charges shall first be given in writing.

(Printed Record pages 684 and 688)

There was a supplemental contract dated April 20, 1909 and it will be found in Printed Record page 678.

The Contract of November 14, 1898, was modified by letters between the parties to the contract dated September 28, 1914, September 30, 1914, and October 3, 1914, which provided for two days free storage instead of four days.

Printed Record pages 674, 675 and 676.

Clause Eleven of the Contract dated November 4, 1898, was modified by letter dated October 3rd, 1914, which increased the price for merchandise requiring cold storage from thirty five cents to sixty cents per ton and the rate of thirty cents per ton on merchandise not requiring cold storage remained unchanged. This is found in the Printed Record page 666.

STATEMENT OF QUESTION INVOLVED.

Are the payments which the READING COMPANY make to the PHILADELPHIA WAREHOUSING AND COLD STORAGE COMPANY, the Appellant herein, under a written contract for services rendered by the Appellant, and the facilities furnished by it, in violation of Sections 2 and 3 of the INTERSTATE COMMERCE ACT?

(Feb. 4, 1887, c. 104, Sec. 2, 24 Stat. 379.
Feb. 28, 1920, c. 91, Sec. 404, 41 Stat. 479)
Code of Laws of the United States Volume 44, part 1, pages 1653 and 1654.

SPECIFICATIONS OF ERROR.

FIRST:

The Court erred in finding and holding that the services rendered by the Appellant under its contract is a trade service and not a transportation service.

(18) (Printed Record page 62)

SECOND:

The Court erred in dismissing the Petition in Equity as filed by the Appellant as this was a Special Contract of Agency.

ARGUMENT.

SUMMARY OF ARGUMENT.

FIRST:

This is a special contract creating an agency for transportation services.

SECOND:

The majority and minority opinion of the lower court did not consider this agency feature of the contract which distinguishes it from a general warehouse.

THIRD:

The Railroad Company had the right to select its own agencies and to pay for the facilities as furnished.

FIRST: The Appellant performs a "special" service under a written contract. It operates a cold storage company, and after the "free time" a new duty devolves upon the Appellant as a Warehouseman in the conduct of its business.

The Appellant is not a general storage house in the same sense as the other Appellants.

The Contract is specific in its character and this is shown with reference to Paragraph 10 of the Contract, (Record page 687) for there is a direct reference to consignments of Dairy and other Products, such as eggs, butter, cheese, poultry, etc.

The Interstate Commerce Commission and the Court below did not attempt to differentiate between the various

warehouses, and the different relations that each have with the other. There is a difference.

The terminal charge is 50 cents per ton on Dairy Products, and 30 cents per ton on General Merchandise. About 99% represents Dairy Products.

The charge covers all duties to be performed including 48 hours free storage and insurance, and if the goods are not removed at the expiration of the 48 hours, free time, they automatically go on storage at the regular storage rates.

The Appellant handles on an average of 3600 cars per year. The freight handled by the Appellant belongs to the parties to whom they are shipped as shown by the freight bills furnished by the Railroad Company to the Storage Company, and the Storage Company collects from the Consignee for their account after arrival notice, and this collection is made by the Storage Company as the Agent of the Railroad and accounted to the Railroad Company.

All the Dairy Products originating on lines using the Railroad Company, Philadelphia delivery, are taken care of by the Storage Company, unless otherwise specified by the Shipper, or the Consignee as provided for in the Contract.

For the Fiscal Year of the Storage Company ending March 31, 1926, the Railroad Company paid to the Appellant, $19,727.39.

For the Fiscal Year of the Storage Company ending March 31, 1927, the Railroad Company paid to the Appellant, $21,908.18.

For the Fiscal Year of the Storage Company ending March 31, 1928, the Railroad Company paid to the Appellant $20,992.42.

The exact number of cars from April 1926, to March 1928, delivered to the Storage Company by the Reading Company amounted to 7,379.

(Printed Record pages 309, 310 and 311.)

The Appellant has no interest whatsoever in the Dairy and Food Products or the General Merchandise except as the Agent of the Railroad Company and acting under its direction.

The Appellant has no legal or equitable interest in any of these goods.

After the free time when they are put in storage, they are held for and on account of the persons to whom they legally or equitably belong, subject only to the storage charges of the Appellant.

The Appellant has no control or direction over the shipment of goods as delivered to it, and it lends its facilities to the Railroad Company, and these facilities are only used by the Railroad Company when the merchandise whatever it may be, is delivered by the Railroad Company to it. Without these facilities the Railroad Company would have to provide a storage house with refrigerating equipment, for the care and maintenance of its merchandise, dairy and perishable food products.

The Railroad Company has no interest directly or indirectly in the Appellant's warehouse.

(Printed Record page 423.)

The Appellant's place of business is located at the main terminal of the Reading Company, Philadelphia, and one of its warehouses is built over the tracks of the Reading Company, and the Railroad Company because of the proximity of the warehouse, uses the facilities of the Appellant for terminal purposes.

The Appellant was in existence long before any of the storage houses of the Complainants and the fact that the Railroad Company uses the facilities of the Appellant for the convenience of its customers, is the best answer that can be made to the Complainants, for if it were not a matter of convenience to the Railroad Company and its customers, this would have long since ceased.

The facilities afforded by the Appellant to the Railroad Company saves the Railroad Company from being put to enormous expense in proving for a warehouse, and the capital expenditure required for such a plant, with its fixed charges, its maintenance and upkeep.

Can it be said that under these circumstances the Appellees or any one else is justified in saying that the Railroad Company was discriminating because they did not employ fifty men (50) when twenty-five (25) would do the work; or can it be said that the Appellee or the Complainants would have the right to say that the Railroad Company in enlarging its yards would be obliged to take property not necessary for its use because there was property immediately adjoining the Railroad?

This is an important act for the benefit of the Railroad. It has no basis of discrimination because it is simply paying an ordinary charge for services performed.

There is no refund by the Railroad Company to the Appellant, no rebate, no drawback.

The Appellant only receives the amount of money as specified in its contract from the Railroad as its agent and for the services it renders and the facilities it furnishes.

The Appellant is obliged to keep its property in first class condition and paragraph 7 of the Contract specifically says what it is obliged to do.

(Printed Record page 686.)

The financial responsibility of keeping its property in first class order and condition is on the Appellant and without any contribution directly or indirectly from the Railroad Company; it is obliged under the terms of this contract at all times to maintain sufficient force, labor and appliances to promptly and expenditiously handle merchandise to the full capacity of the Storage House.

The INDUSTRIAL COLD STORAGE AND WAREHOUSE COMPANY was one of the Complainants in the case before the Interstate Commerce Commission. Its place of business is located at 1905 N. American Street, Philadelphia, and it is served by the Reading Company. It was organized long after the contract entered into between the Appellant and the Railroad Company and its place of business is removed some considerable distance from that of the Appellant.

(Printed Record pages 234, 235 and 236.)

This Company was the only complainant so far as the Appellant was concerned, and it is respectfully submitted that under the circumstances of this case the contract existing between the Appellant and the Railroad Company and its place of terminal and its existence as a Company long prior to that of the Industrial Cold Storage Company must be given consideration for the basis of the contract was the proximity to the trade, the convenience to the parties, and the facilities afforded to the Railroad Company, and the obligation under which the Appellant performs its services, equips its buildings and maintains and operates the same as well as the financial burdens imposed thereon.

The contention of the Appellant therefore is that there is no violation of Sections 2 and 3 of the INTERSTATE COMMERCE ACT (February 4, 1887, c. 104, Sec. 2, 24 Stat. 379, February 28, 1920, c. 91, Sec. 404, 41 Statute 479) for the reason that there is no special rate, rebate, drawback or other device, charge or demand collected or received by the Appellant other than the amounts stipulated specifically in the contract between it and the Railroad Company.

These words as defined in Section 2 have a well defined meaning and need no explanation.

SECOND: The Appellant filed a petition in Equity in this case in the court below praying for an injunction, which petition was dismissed. The lower court in both the majority and minority opinion did not give any special consideration to the position as taken by the Appellant. A reference to the opinion of the Court below will show a discussion of the general features of the case, but without any reference to the position of the Appellant by reason of the special contract of agency, and the facilities as furnished. It is most earnestly contended that this special feature of the contract of agency and the facilities as furnished by the Appellant and the contract, deserves very serious consideration by reason of the duties imposed by the Appellant under the terms of the written contract with the Railway Company.

The opinion of the Lower Court: (Printed Record page 30.)

THIRD: The Appellant operated with the Railroad Company, under a written contract. It was a contract of agency and the Appellant was obliged to do and perform certain services for the benefit of the Railroad as specifically defined in the Contract. The duties of the Appellant have been set forth in part 1 of this Argument, and they need not be again discussed.

The INTERSTATE COMMERCE Commission and the Court below gave great consideration to the case of

TERMINAL WAREHOUSE OF BALTIMORE vs. UNITED STATES et al 41 Federal Reporter Second Edition page 951

and this case is relied on by the Appellees.

The case is distinguished from the present case for the following reasons:

1. The McCORMICK case was decided upon the theory of a "general warehouse" as distinguished from the case under consideration, which is a Cold Storage Company, and which operates under a "special contract".

2. Because the Consignor and Consignee have no relation to the Storage Company.

3. Because the Storage Company has no dominion over the goods.

4. Because the Storage Company is paid for the services it renders as the Agent of the Railroad under a written contract, and the Storage Company does not receive a "rebate" from the Railroad.

5. Because after the "free time" a new duty devolves on the Storage Company to protect the goods delivered to it as a cold storage house, and to be paid as a warehouseman.

It has been well settled that a railroad carrier may exercise its own discretion in the selection of its agents and employees to perform any part of its transportation service; that the mere granting of privileges which are incidentally a part of the compensation for which services are rendered is not unlawful as preferential or discriminatory as against others who are not thus selected.

DELAWARE LACKAWANNA & WESTERN R. R. CO. vs. MORRISTOWN, 276 U. S. 182;
DONOVAN vs. PENNSYLVANIA Co., 199 U. S. 279;
GREAT NORTHERN RY. CO. vs. MINNESOTA, 238 U. S. 340;
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BLACK AND WHITE TAXICAB CO. vs. BROWN AND YELLOW TAXICAB CO., 276 U. S. 518.

The Appellant contends that under this special form of contract, the facilities as furnished by it, and the cases above quoted sustain the position of the Railroad Company in entering into this form of contract of agency.

The many questions raised in this case have been discussed by the Brief filed by the other Appellants, and it would only be taken up the time of the Court in repeating the Argument, and the discussion of the cases and for that reason these questions have not been discussed in this Brief.

It is therefore respectfully submitted that the judgment of the District Court of the United States for the Eastern District of Pennsylvania in dismissing the petition in equity in this case should be reversed.

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CHARLES ELMORE C

IN THE

SUPREME COURT OF THE UNITED STATES.

Nos. 635, 636, 638, 639, 641, 642, 637, 640, 643—October Term, 1930.

Merchants Warehouse Company, *Appellant*,

635 vs.

United States, et al., Appellees.

Also related cases under dockets 636, 638, 639, 641, and 642, as stated more in detail at pages 1 and 2 herein.

United States, et al., *Appellants*,

637 vs.

Merchants Warehouse Company, et al., *Appellees*.

Also related cases under dockets 640 and 643, as stated more in detail at pages 1 and 2 herein.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Brief of

JAMES GALLAGHER,
NORTHEASTERN WAREHOUSE COMPANY,
WALTER A. BAILEY,
TERMINAL WAREHOUSE COMPANY,
REX & COMPANY, Inc.
INDUSTRIAL COLD STORAGE AND WAREHOUSE COMPANY,

Appellees in Nos. 635, 636, 638, 639, 641 and 642.
Appellants in Nos. 637, 640 and 643.

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IN THE

SUPREME COURT OF THE UNITED STATES.

Nos. 635, 636, 638, 639, 641, 642, 637, 640, 643—October Term, 1930.

Merchants Warehouse Company, *Appellant*,

635

vs.

The United States of America, Interstate Commerce Commission, and James Gallagher, et al.

Merchants Warehouse Company, The Commercial Exchange of Philadelphia, Philadelphia Board of Trade, et al., *Appellants*,

636

vs.

The United States of America, Interstate Commerce Commission, and James Gallagher, et al.

The Pennsylvania Warehousing and Safe Deposit Company, *Appellant*,

638

vs.

The United States of America, Interstate Commerce Commission, and Walter A. Bailey, et al.

The Pennsylvania Warehousing and Safe Deposit Company, The Commercial Exchange of Philadelphia, Philadelphia Board of Trade, et al., *Appellants*,

639

vs.

The United States of America, Interstate Commerce Commission, and Walter A. Bailey, et al.

The Philadelphia Warehousing & Cold Storage Company, *Appellant*,

641

vs.

The United States of America, Interstate Commerce Commission, and Rex & Company, Inc., et al.

Philadelphia Warehousing & Cold Storage Company, The Commercial Exchange of Philadelphia, Philadelphia Board of Trade, et al., *Appellants*,

642

vs.

The United States of America, Interstate Commerce Commission, and Rex & Company, Inc., et al.

The United States of America, Interstate Commerce Commission, and Walter A. Bailey, et al., *Cross-Appellants*,

637 vs.

Merchants Warehouse Company, et al.

The United States of America, Interstate Commerce Commission, and Walter A. Bailey, et al., *Cross-Appellants*,

640 vs.

The Pennsylvania Warehousing & Safe Deposit Company, et al.

The United States of America, Interstate Commerce Commission, and Walter A. Bailey, et al., *Cross-Appellants*,

643 vs.

The Philadelphia Warehousing & Cold Storage Company, et al.

BRIEF OF JAMES GALLAGHER, ET AL.,

Appellees in Nos. 635, 636, 638, 639, 641 and 642.

Appellants in Nos. 637, 640 and 643.

THE APPEAL AND CROSS-APPEAL ARE ARGUED HEREIN.

This is the brief of the warehouse companies that were damaged by the rebates. We argue the appeal and cross-appeal in this brief. Par 11 of our brief is directed to the cross-appeal and all other parts are directed to the appeal.

In the cases on appeal we are appellees and in the cross-appeals we are appellants. To avoid confusion in the use of the terms appellants and appellees we refer to the warehouse companies that received the rebates or subsidies as the contract warehouse companies and to ourselves as the non-contract competitors.

REFERENCES TO OPINIONS DELIVERED IN THE COURT BELOW.

The opinion of the specially constituted District Court (R. 30) is reported at 44 F. (2d) 379.

The report and order of the Interstate Commerce Commission, (R. 142) appears as *Gallagher et al.* v. *Pennsylvania R. Co.*, 160 I. C. C. 563.

THE QUESTIONS PRESENTED.

Is the Commission's order (R. 142) void because it does not have substantial support of evidence? Is that order invalid in that it restrains three carriers from giving certain allowances. Is that order invalid because it requires the three carriers to cancel certain provisions of their filed and published tariffs?

The Commission's order (R. 151) requires the Pennsylvania Railroad Company, the Baltimore and Ohio Railroad Company and the Reading Company to cease, desist, and abstain from publishing and making allowances, out of their freight rates, to the respective contract warehouse companies in connection with the loading or unloading of package freight at Philadelphia, Pa. In short the order requires those common carriers to discontinue unlawful rebating.

Our position is that the Commission's order is lawful and valid. We submit that the judgment of the Court below condemning the substantive offense should be affirmed, and that the order of that Court granting a temporary stay of the order of the Commission should be reversed. We are in complete agreement with the United States and the Interstate Commerce Commission on all issues in these cases.

STATUTES INVOLVED.

(a) *Statutes Relied Upon.*

We rely upon the following statutes:

Section 2 of the Interstate Commerce Act, U. S. Code, Title 49, Section 2—

> "2. *Special rates and rebates prohibited.* If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

Section 3 (1) of the Interstate Commerce Act, U. S. Code, Title 49, Section 3 (1)—

> "Section 3, par. (1) *Undue preferences or prejudices prohibited.* It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Pertinent provisions of Section 3 of the Elkins Act, U. S. Code, Title 49, Section 43—

"Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the district court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law . . ."

(b) *Statutes having an important bearing.*

Pertinent provisions of Section 1 of the Elkins Act, U. S. Code, Title 49, Section 41—

". . . and it shall be unlawful for any person, persons or corporation to offer, grant or give or to solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any

property in interstate or foreign commerce by any common carrier subject to said Act to Regulate Commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, . . . or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly offer grant or give, or solicit, accept or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor . . ."

"In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person . . ."

The rules of practice require that we quote the relevant parts of statutes which are deemed to have an important bearing and, therefore, more especially in support of our cross appeals, we have quoted certain provisions of the Elkins Act.

STATEMENT OF THE CASE.

Our opponents have stated the proceedings before the Interstate Commerce Commission, the review and opinion of the statutory court, and the docketing of the cases in this Court.

In the cases presented on the formal docket of the Interstate Commerce Commission, which were instituted by three formal complaints, there were six complainants, who operated 18 warehouses, four competitors who operated 22 warehouses and three defendant common carriers. The names of these parties are shown in the following table.

Commission's Docket No.	*Complainants*	(a)	*Competitors*	(a)	*Defendants*
20968	James Gallagher	3	Merchants Warehouse Company	10	Pennsylvania Railroad Company
	Northeastern Warehouse Company	1	Quaker City Cold Storage Company	1	
	Walter A. Bailey	2			
	Terminal Warehouse Company	9			
20968 Sub. 1	Walter A. Bailey Terminal Warehouse Company		Pennsylvania Warehousing and Safe Deposit Company		Baltimore and Ohio Railroad Company
20968 Sub. 2	Rex & Company, Inc.	2	Pennsylvania Warehousing and Safe Deposit Company	10	Reading Company
	James Gallagher Northeastern Warehouse Company		Philadelphia Warehousing and Cold Storage Company	1	
	Walter A. Bailey Terminal Warehouse Co.				
	Industrial Cold Storage and Warehouse Company	1			

(a) Indicates the number of warehouses operated by the complainants and competitors. (R. 570, 471.)

Three of the four competitors named above, the companies that received the rebates, are the appellants in the cases Nos. 635, 636, 638, 639, 641 and 642, and the appellees in the cross-appeals, Nos. 637, 640 and 643. One of the competitors, the Quaker City Cold Storage Company, was not a party to the proceedings in the Court below and is not a party to the cases in this Court. The complainants named above are the appellees in Nos. 635, 636, 638, 639, 641 and 642 and appellants in the cross-appeals. The defendant carriers named above have not participated in the proceeding before the Court below or in this Court.

In the three complaints, filed with the Interstate Commerce Commission, the complainants alleged that the defendant carriers gave allowances, out of their freight rates, and thereby subsidized the competing warehouse companies subjecting the complainants to unjust discrimination in violation of Section 2 of the Interstate Commerce Act, and, further, gave undue and unreasonable preference and advantage to the contract warehouse companies and subjected the complainants to undue and unreasonable prejudice and disadvantage in violation of section 3 of that Act.

The contract warehouse companies and their non-contract competitors were engaged in the warehouse business, general warehousing, at Philadelphia, Pa. The warehouses which they operated were served by private side tracks connecting with the railway lines of the defendant carriers. The contract warehouse companies and their non-contract competitors each competed with the other in inducing manufacturers and wholesalers located at points outside Philadelphia and various concerns located in Philadelphia to ship goods in carloads over the railway lines of the defendant carriers to the warehouses in Philadelphia to be handled, distributed in small lots and stored in their warehouses. The revenue and income of the warehouse companies was derived from that warehousing of goods. The cost of service

to the patrons of the warehouses was the freight rates plus warehouse service charges and the aggregate of the freight rates and warehouse charges was the controlling consideration which caused such patrons to patronize one warehouse company and refuse to deal with a competing warehouse company. The allowances enabled the contract warehouse companies to quote lower charges in the aggregate and thereby underbid their non-contract competitors, subjecting the latter either to loss of business when they were underbid or to diminution of normal business profits and revenues when they were forced to reduce their normal warehouse rates and charges to meet that unfair competition. That is the substance or effect of the unjust discrimination and undue prejudice alleged and proved.

The allowances were specified in certain contracts or agreements in writing between the defendant carriers and the contract warehouse companies which receive attention in detail below.

The Commission, in its report, found that the non-contract competitors proved the allegations of substance in their complaints. The Court below, upon reviewing the Commission's report and the record, sustained the Commission's order and made certain findings of fact supplemented by conclusions of law (R. 58) as follows:

FINDINGS OF FACT

"1. The plaintiff warehouses and the complainants before the Commission, who are intervening defendants in this proceeding, operate at Philadelphia warehouses, at and from which they ship and receive, load, unload, store, distribute, and deliver in small quantities carload lots of merchandise, known as 'package freight', carried or to be carried at carload rates, which they have previously solicited for such handling from their customers located generally in cities outside of

Pennsylvania. For those services they collect from their customers certain warehouse rates and charges.

"2. In all the larger cities, including Philadelphia, public warehouses are customarily used for the receipt, storage, and distribution of merchandise. These warehouses perform an important public service. The merchandise warehouse receives goods in carloads and distributes them in smaller quantities to local jobbers or retailers, or re-ships them in less-than-carload lots to near-by destinations; issues negotiable and non-negotiable receipts, provides insurance, and allows credit to be obtained on merchandise stored; provides recoopering, marking, and separation of varieties, and various incidental clerical services. Warehouse services enable manufacturers to keep spot stocks for their customers; equalize production by steadily absorbing the manufacturers' output while eliminating heavy investment in reserve storage space; reduce freight charges and save time in transit through handling goods in carload quantities; reduce fire risk and loss and damage claims; and eliminate the necessity of providing storage space at point of origin.

"3. The plaintiffs in the instant case operate, in competition with the interveners, who were complainants before the Commission, the same type of warehouses and render the same kind of services generally as the intervenors, for which charges are collected from their customers.

"4. The carriers, the Pennsylvania Railroad Company, the Baltimore and Ohio Railroad Company, and the Reading Company, pay to the plaintiffs, in connection with the loading, unloading, and 'handling' by them of such merchandise, certain sums, ranging from 30¢ to 50¢ per ton, but make no such payments to the warehouses which were complainants before the Commission. No payments are made if the shipments are unloaded within the forty-eight hours free time. The Pennsylvania Railroad Company pays the allowances in question to the Merchants Warehouse Company and

the Quaker City Cold Storage Company, the Baltimore and Ohio to the Pennsylvania Warehousing and Safe Deposit Company, and the Reading Company to the Philadelphia Warehousing and Cold Storage Company, the plaintiffs here. Payments are also made by the Reading to the Pennsylvania Warehousing and Safe Deposit Company.

"5. In some instances, the carriers own the land or warehouses which the plaintiffs hold under lease. In other instances, the carriers do not own the land or the warehouses.

"6. The contracts provide that the warehouse shall accord to traffic passing over the lines of the carrier preference in facilities furnished by the warehouse over traffic passing over other lines; shall load or unload or handle freight received to be shipped over the lines of the carrier, or received by the warehouse from the carrier for delivery to consignees; shall notify the consignees of the arrival of incoming freight; shall be responsible for the prompt collection of freight charges and other charges upon in-bound freight; shall indemnify and hold harmless the carrier for all damage to and all loss of freight in the custody of the warehouse; shall maintain fire insurance; shall notify the carrier of the failure of consignees to receive freight; shall comply with directions with respect thereto received from the carrier; shall indemnify the carrier against liability on account of any of the warehouses' acts of omission and on account of bills for merchandise issued by the warehouse.

"7. The terminal services of the contract warehouses include the removing and recording of the seals from the cars placed for unloading, placing seals on loaded cars and preserving the record thereof, examining the merchandise, noting the damage and the cause thereof, the prompt inspection of the equipment, prompt loading and unloading to minimize delay, storing the shipment for the forty-eight hours free time, including protection against fire through insur-

ance, taking up bills of lading and canceling the same, delivering the merchandise to the consignee and taking receipts therefor, handling claims for damage, disposal of refused merchandise, executing bills of lading for outbound shipments, tallying the contents of the cars.

"8. The contract warehouses and the intervening warehouses are engaged in the same kind of business, and each ships and receives at its warehouses package freight of all kinds destined to or shipped from various points in the United States over the railroads, and the circumstances and conditions surrounding handling and movement of the traffic are similar if not identical.

"9. The services which the contract warehouses perform, for which the contracts provide for the payment of compensation by the carrier to them, are performed, for their patrons, by the intervening defendants who were complainants before the Commission; the latter load and unload the freight for their patrons, pay and collect freight charges, send notices of arrival to their customers, check the contents of the cars, give the railroads reports, notify the railroads of damage to the freight, prepare bills of lading, mark and stencil packages, recooper and perform in general identical services for their patrons.

"10. The warehouses of the plaintiffs and those of the intervenors are served by private side tracks or sidings connecting with the lines of one or more defendants.

"11. Both handle the same classes of freight and both obtain business by widespread advertising in prominent trade publications by sending letters pamphlets, and circulars to prospective customers offering them their services, and by personal solicitation.

"12. There is active and keen competition between complainants and the contract warehouses.

"13. Concerns using public warehouse facilities generally select the company offering them the lowest aggregate charge for the distribution of their goods.

By means of the allowances the contract warehouses are able to quote lower charges than can the intervenors.

"14. The contract warehouses are compensated for the solicitation of freight for movement over the lines of the respective defendants through the payment of the allowances in question.

"15. Traffic considerations have been the primary motive for the payment of these allowances.

"16. The facilities of the contract warehouses, while nominally open to the general public as railroad freight stations, are not in fact open public stations, but are confined to the handling of merchandise for the patrons of the warehouses.

"17. The services performed by the contract warehouses in connection with the loading or unloading of freight, including the sending of arrival notices, the collection of freight charges, and other incidental matters, are in fact performed for the benefit of the owner of the merchandise rather than for the railroads.

"18. The service rendered by the warehouses under the contracts is a trade service and not transportation service.

"19. While the contract warehouses are not the owners of the goods received or shipped by them, all of the dealings are with these warehouse companies, and none with the owners of the goods.

"20. As to many of the inbound carload shipments, the contract warehouses are the only parties to whom delivery of the goods could be made as carload shipments, the real owners being concerns which ship carload merchandise to the contract warehouses for distribution in less-than-carload lots.

"21. The contract warehouses, even though not the owners of the goods, have been given dominion over such goods for transportation purposes, and accordingly for transportation purposes they should be deemed the consignors of shipments from or con-

signees of shipments to their warehouses. The same is true as to the intervening warehouses, shipments from and to their warehouses being handled in substantially the same manner.

"22. The Pennsylvania Railroad and the Baltimore and Ohio Railroad have made provisions in their tariffs by which they take upon themselves the service to consignors and consignees of loading and unloading carload package freight carried at railroad rates.

"23. Rule 27 of the Official Consolidated Freight Classification, to which the carriers are parties, provides as follows:

> "Section 1. Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at carload ratings."

"24. The Pennsylvania Railroad and the Baltimore and Ohio Railroad provide in their tariffs by exceptions to Rule 27 that they agree to load or unload carload package freight at certain Philedalphia freight stations, included among which are the contract warehouses.

"25. The Reading Company has no such tariff provisions.

"26. The practice of plaintiffs in making allowances to the contract warehouses in connection with the loading or unloading of package freight at Philadelphia as aforesaid and refusing to make similar allowances to intervenors for performing similar services results in unjust discrimination, in undue preference of the contract warehouses, and in undue prejudice to complainants.

"27. These contracts for the payment of the allowances are devices to attempt to lend legality to the payment of rebates to the contract warehouses."

CONCLUSIONS OF LAW.

"1. The payment of the allowances by the railroads in accordance with the contracts, is unlawful in that it subjects the intervening warehouses to unjust discrimination as against the contract warehouses.

"2. The payment of the said allowances gives an undue and unreasonable preference and advantage to the contract warehouses and subjects the intervening warehouses to an undue and unreasonable prejudice and disadvantage.

"3. The allowances paid to the contract warehouses are unlawful as rebates.

"4. The order of the Interstate Commerce Commission of September 28, 1929, is in all respects a lawful order.

"5. The petitions should be dismissed."

SUMMARY OF THE PRINCIPAL POINTS ARGUED.

1. The Commission's order has substantial support of evidence and, therefore, should be sustained.

2. The warehouse concerns, both contract and non-contract, are persons within the meaning of the words "any person" in sections 2 and 3 of the Interstate Commerce Act. The non-shipper argument of our opponents has no support of the statute or substance.

3. The rebates were exceptionally injurious to the business of the non-contract competitors.

4. The allowances are not compensation for service and are not rent for the use of facilities. They are, both in form and substance, traffic buying rebates or subsidies.

5. The contract warehouse companies did not perform any service for the carriers giving the allowances and those warehouse companies did not devote the use of any of their facilities to the public service of the carriers.

6. The use of facilities of the contract warehouse companies and the services performed by those companies were devoted exclusively to the private business activities of the contract warehouse companies and resulted to the sole benefit and profit of those companies and such use and services were trade activities not lawfully includible in common carrier duty or service.

7. The contracts, which our opponents rely upon, are unlawful and corrupt agreements through which the carriers bought the large freight traffic of the contract warehouse companies by giving unlawful rebates. That is, the carriers gave the rebates solely for the purpose of unduly influencing the routing of that traffic over their railway lines.

8. The writings in the filed and published railroad tariffs, relied upon by our opponents, are components of the unlawful schemes and devices used by the carriers to buy the traffic by the means of unlawful rebates.

Our opponents argue that the fundamental facts are undisputed and that there is no evidence that impugns the good faith of parties to the contracts. We cannot concur in those statements because there is sharp disagreement on the fundamental facts and in our formal complaints and throughout the proceedings we asserted bad faith and wilful unlawful conduct. Our opponents assert use of their facilities by the railroads and performance, by the contract warehouse companies, of service for the carriers in justification of the allowances. It seems to us that our opponents base their proof largely, if not wholly, on

writings in contracts and railroad tariffs. We, in opposition, insist that the writings are insufficient and that there is no evidence of actual use of the facilities or actual performance of the services in common carrier service.

These cases present the well-known railroad rebate attended by the traditional devices intended to conceal and disguise it which compel us to argue the cases at length.

In *Vandalia R. R. Co.* v. *United States,* 226 Fed. 713, 716, (C. C. A. Seventh Circuit) the Court said:

> "The history of this legislation demonstrates that both discriminations and rebates have ever been sought to be hidden under the most subtle disguises. Every device that seeks to cover up either a rebate or a discrimination in interstate commerce is denounced by the statute." . . .

ARGUMENT.

1. The Commission's Order has substantial support of evidence and, therefore, should be sustained by this Court.

In cases where the Commission's order has substantial support of evidence the Courts will not weigh the evidence further or consider the wisdom of the Commission's action. *C. R. I. & P. Ry. Co.* v. *United States,* 274 U. S. 29, 33, 34; *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 663; *The New England Division Case,* 261 U. S. 184, 203; *Seaboard Air Line Ry. Co.* v. *United States,* 254 U. S. 57, 62. The Commission's report is supported by an abundance of evidence, part of which is reviewed herein.

Whether a practice is unjustly discriminatory or preferential is a question of fact entrusted exclusively by the

Act to the Commission for determination upon the evidence in a particular case. *I. C. C.* v. *Alabama Midland Ry. Co.*, 168 U. S. 144; *Nashville Ry.* v. *Tennessee*, 262 U. S. 318.

2. Each of the warehouse concerns is a person, within the meaning of the words "any person", as used in sections 2 and 3 of the Interstate Commerce Act, and each of them, is a shipper.

Our opponents contend that the warehouse companies are not shippers. That argument challenges jurisdiction and evidently means that the complaining warehousemen, not being shippers, have no statutory right of action and being outside the purview of the Interstate Commerce Act, are outlaws. Also that the warehouse companies that received the rebates, not being shippers, together with the carriers that gave the rebates, are immune from application of the two statutes that inhibit the giving of rebates. This is a formidable claim of immunity.

(a) *The claim of immunity is without foundation.*

Shipments of freight handled by the warehouses at Philadelphia are billed to a person nominated by the owner of the freight "in care of" the warehouse company. The contention of the opposition, as we understand it, is that the care-of party is not the consignor or consignee and, therefore, is not the shipper. Our view is that the care-of party may be, and in the cases in hand is, the shipper and that underlying substance rather than writings on billing is controlling. The courts and the Commission evidently have not announced an all-embracing meaning of the word shipper. The meaning of that word, like the meaning of scholar and farmer, may be debated at length. The oppo-

sition briefs do not take a definite position as to the meaning of the word shipper.

The word shipper does not appear in sections 2 and 3 of the Interstate Commerce Act, the most pertinent statutory sections here, and in lieu thereof the words "any person" appear in those sections. Sections 8 and 9 of that Act, which deal with liability and means for relief, also evince avoidance of the use of the elusive word shipper and, in lieu of that word, show significant use of the words "person" and "any person".

A group composed of several persons, including a buyer, banker, truckman, warehouseman, trust company and broker or sales agent, may take concerted action which will result in the transportation of freight by railroad. It may be that the names of only two members of the shipping group of ten persons will be entered on bills of lading or railroad billing. But rebates given to any one of the eight persons in the shipping group, whose names do not appear on the billing, would be as injurious to competing shippers and shipping groups as rebates given to the two members named on the bills of lading as consignor or consignee of the shipments.

Under Section 1 of the Elkins Act the test of unlawful conduct is not applied to the person receiving the rebate. The test is—did the carrier give a rebate to any person and, if so, did the giving of the rebate defeat the carrier's published rates or inflict discrimination, etc. Likewise, under Section 2 of the Interstate Commerce Act, rebates are unlawful if given to any person and the unlawful character of the rebate is ascertained from the effect of the giving and not by the question—to whom was the rebate given. Rebates are unlawful whenever they have the forbidden effect whether given to a person named in the bill-

ing or a "care of party", rate payer or any other member of the shipping group named or not named in the billing. If that is not the meaning of the two statutory sections then there is virtually no statutory restraint of rebating. The courts have said that these statutes must be given the effect that will accomplish the great public purpose that they were enacted to serve. *Armour Packing Company* v. *United States*, 209 U. S. 56; *Vandalia R. Co.* v. *United States*, (C. C. A. Seventh Cir.), 226 Fed. 713.

Northern Central Ry. v. *United States*, (C. C. A. Second Cir.), 241 Fed. 25, certiorari denied, 245 U. S. 645, is in point. In that case the Court affirmed conviction of the defendant for granting concessions in violation of Section 1 of the Elkins Act. The concessions were granted to the Mineral Railroad and Mining Company, an operator of coal mines. The Mining Company sold its coal at the mouth of the mines to the Susquehanna Coal Company which shipped the coal. The party to whom the concessions were given was not the consignor or consignee of shipments nor the rate payer.

Section 2 of the Interstate Commerce Act and Section 1 of the Elkins Act forbid the giving of rebates by common carriers to any person. And Section 1 of the Elkins Act inhibits shippers, agents of shippers, or persons acting for shippers, from soliciting, accepting or receiving rebates or concessions from common carriers. The contract warehouse companies are the agents, engaged in the distribution of carload freight at Philadelphia, of numerous well-known manufacturers and wholesalers located at various points in the United States. (R. 548, 549, 563, 597.) A rebate given to the distribution agent of those concerns is as unlawful and injurious as a rebate given to the treasurer, traffic manager or any other agent of those concerns.

(b) *The complaining warehousemen have a statutory right of action.*

Turning now to the non-contract warehouse companies. The statute clearly is sufficient to afford the protection and relief which they seek. Each of the non-contract concerns conducts a lawful business and the aggregate of their investment therein is $10,400,000 (R. 202, 218, 243, 251, 268, 561). Transportation of the goods which they handle to and from their warehouses by railroad is essential to the successful and profitable conduct of their business and in the absence of railroad transportation service the local tonnage, not transported by railroad, would not yield revenue sufficient to pay their operating expenses. (R. 210, 218, 219, 234, 235, 243, 251, 266, 267, 274). A common carrier is one who undertakes to carry the goods of *all persons* who apply for such carriage. *Hutchinson On Carriers* (3rd Ed.), Section 47. If the three common carriers, who gave the rebates, are compelled by law, their charters and their published tariffs, to transport shipments in response to reasonable request of any warehouse company then it seems they must perform that transportation service subject to all conditions imposed by the Interstate Commerce Act. If the carriers cannot arbitrarily refuse to transport in response to request of a warehouse company they cannot evade responding to the complaint of the warehouse company under sections 2 and 3 of the Interstate Commerce Act and that, we submit, is the proper test. If the carrier can deny transportation to the warehouseman then the business of the warehouseman can be destroyed at the will of the carrier. The warehouse companies, being persons within the meaning of the words "any person" as used in sections 2 and 3 of that Act, have ample authority to invoke those two sections of the Act.

Those carriers, as public servants, must respond to the reasonable request of the warehouseman.

If the non-contract warehouse companies at Philadelphia are not entitled to the protection of the Interstate Commerce Act then the great warehouse industry at all points in this country will be exposed to condemnation by means of the railroad rebate evil. And evidently the theory which so outlaws the warehouse industry will also outlaw all middlemen and those who act in a representative capacity, including commission merchants, brokers, sales agencies, banks and trust companies, not under any test reflected in the Interstate Commerce Act, but under some vague and undisclosed conception of the meaning of the word shipper which contemplates that only owners of goods shipped when their names are entered as consignors or consignees on bills of lading and, in such case, subject to certain conditions, are shippers. The Commission refused to apply such a test.

In *California Commercial Association* v. *Wells Fargo & Co.*, 14 I. C. C. 422, 427, the Commission said:

> "Where can we logically stop if we depart from the simple tests which may be put by the carrier's agent at the time of shipment: (a) Who offers this shipment? (b) Of what does it consist? (c) To whom, and where, is it bound? For its purposes as a common carrier the railroad or the express company needs no other information than may properly be elicited by these questions, and it would appear improper and unreasonable that it should be permitted to go into the vague and illimitable realms outside of and beyond such needs. The carrier deals with the shipper who tenders it, not with the owner of the property or the last and most remote person to whom it is distributed. To veer from this straight course, no matter to how slight a degree or for what apparently beneficial pur-

pose, is to lead away from the policy of the law which condemns discriminations and preferences."

The warehouse companies would be entitled to the protection of the Interstate Commerce Act, on making a proper showing, if their names were not entered on bills of lading or railroad billing. And if absence of names from billing will not bar such protection it follows that the entry of their names as care-of parties has little significance. The Commission, in awarding reparation for violations of the Act, has repeatedly reached the conclusion that absence of the name of the claimant from bills of lading or departure from customary form of entering the claimant's name as consignor or consignee on billing did not bar the claimants statutory rights. For example, in *Kyoleum Co.* v. *Director General,* 104 I. C. C. 1, 3, and in *Kaw Rvier Sand and Material Company* v. *Director General,* 93 I. C. C. 346, 347, the names of the claimants were not entered on the billing. In *Nebraska Bridge Supply & L. Co.* v. *A. G. S. S. R. Co.,* 128 I. C. C. 94, 96, trade names, instead of the correct corporate name, were entered on the billing.

Conceding that the non-contract warehouse companies, to make out their case, must show that the discrimination was not merely nominal but was unjust in that it was a source of positive advantage to their competitors and that the non-contract warehouse companies, and not other parties, were injured thereby to an appreciable extent. *Nashville Ry.* v. *Tennessee,* 262 U. S. 318, 322. We make that showing in considerable detail in Section 4 of our brief following, with reference to supporting evidence. Here we will discuss the point briefly. Stated shortly, the service involved was railroad transportation, cost measured by published freight rates, and warehouse handling, cost measured by warehouse charges. The lowest aggregate of those two cost factors diverted the business to one of

the two shipping groups which could impose the lowest aggregate. Certain shipping groups, composed of the contract warehouse companies and parties originating shipments outside Philadelphia had the benefit of rates, lower in the amount of the allowances, than the shipping groups composed of the non-contract warehouse companies and such parties. The parties originating the shipments refused to deal with the non-contract warehouse companies unless and until the non-contract companies assumed that difference in rates. The assumption of that rate difference by the non-contract warehouse companies resulted in diminution of their normal charges and profits. If and when the non-contract warehouse companies refused to assume and bear the rate difference the business was diverted to the contract warehouse companies. But in either case all of the injury and damage resulted to the non-contract warehouse companies and none to other parties and, therefore, the non-contract warehouse companies are singled out of these shipping groups and shown to be the only parties injured.

The question as to who paid the freight rates is not material here because the injury to the non-contract warehouse companies arose either from diversion of their business to their competitors or diminution of their normal profits. The freight charges on an inbound shipment from Ohio might be prepaid at point of origin or a person in Philadelphia, other than the warehouse company, might pay the freight charges directly to the railroads, but the non-contract warehouse companies were operating under conditions imposed precedent to running or continuing contracts with manufacturers or wholesalers, (R. 274-281), and payment of freight charges by others, an incident of the arrangement, could not diminish the injury or damages of the non-contract warehouse companies. Their damages, like the damages of the shipper based on insuffi-

cient or discriminatory allotment of cars, is not mitigated when another pays the freight charges.

Damage in such case is the actual pecuniary loss of each of the non-contract warehouse companies. *Penna. R. R. Co.* v. *International Coal Company*, 230 U. S. 184, 206. The unlawful rebating has continued to date. We cannot prove the amounts of the damages until the rebating is stopped by finding and order of this Court. Piece-meal proof of damages at intermediate stages would be contrary to the procedure prescribed by the Interstate Commerce Commission. *Michigan Hardwood Manufacturers Asso.* v. *Freight Bureau*, 27 I. C. C. 32, 36. *Eichenberg* v. *Southern Pacific Company*, 28 I. C. C. 584. However, definite evidence of injury was presented in great detail and stands uncontradicted. The Commission's finding of unjust discrimination, undue preference and undue prejudice is supported by an abundance of uncontradicted evidence.

In *Terminal Warehouse Company* v. *United States*, 31 Fed. (2d) 951, 959, the statutory court, passing on the very point under discussion, said that warehouse companies are entitled to the protection of the Interstate Commerce Act.

(c) *Warehousemen are consignors, consignees, rate payers and shippers.*

The evidence shows that the warehouse companies are consignors and conginees of shipments and also are rate payers.

Dealing with facilities first. An ordinary consignor or consignee of shipments, for his private side track service, assumes and bears investment charges in land and side tracks and the wages of his laborers employed to load or unload his carload freight. (R. 298). Many such persons use side track service at Philedalphia. (R. 747-756, 767-774). Prominent business concerns at Philadelphia, includ-

ing the John Wanamaker Store, Sears-Roebuck and Company and the Great Atlantic and Pacific Tea Company, operate warehouses equipped with private side tracks. (R. 280.)

Certain business concerns located outside Philadelphia, and certain business men in Philadelphia who have offices or selling facilities, but not side track or warehouse facilities, employ the contract warehouses and the non-contract warehouses and thereby obtain side track and warehouse service. (R. 189-194, 203, 204, 269-275, 302-305, 598.)

It appears from the facts stated that side track and warehouse services are ordinary services customarily provided by shippers for their own use and at their own cost and expense. The position of the contract warehouse companies is that when they provide side track and warehouse service there should be a departure from custom and practice in that the cost or expense of the service should shift from the shippers to the carriers. Another point we urge is that the contract warehouse companies and the non-contract warehouse companies, in hiring out their services, join shipping groups for the purpose of supplying the side track and warehouse service needed by every important shipping group in their transactions with the carriers.

Now to show additional shipping activities of the contract warehouse companies.

The advertisment of the Philadelphia Warehousing and Cold Storage Company (Ex. 49, Vol. III), and its letter (R. 599), clearly portray its business activities. The following is quoted from Exhibit No. 49:

> "Merchandise received in carload lots handled without cost for cartage. All freight for delivery to us should be consigned to Philadelphia Warehousing and Cold Storage Company, Beach and Noble Streets, Philadelphia, Pa., via Reading Company, to insure lowest

rates and least expense to consignors. Correspondence and business solicited. Liberal advances made."

The advertisment of the Merchants Warehouse Company (Ex. 3, Vol. III), reads in part as follows:

"Carloads received and distributed. L. C. L. lots and carload lots shipped to all points. Served by Pennsylvania System without added expense."

We quote the following from a letter from the Pennsylvania Warehousing and Safe Deposit Company, one of the contract warehouse companies, to the Chicago Jewelers Tool Works, Chicago, Illinois, under date of June 16, 1928. (Ex. 42, R. opp. 596.)

"Replying to your inquiry of the 14th instant, we beg to submit our storage rates on Machines measuring 48x24x24" weighing approximately 300 pounds each, as follows:

"50¢ per crate the first month and 35¢ per crate each month thereafter or fractional part thereof.

"We propose to store your Machines in our 23rd Street Stores, 224-228 No. 23rd Street, which is directly served by the Baltimore & Ohio Railroad Company, therefore, your carload shipments should be consigned to us as follows:

"In care of—Pennsylvania Warehousing and
Safe Deposit Company,
23rd Street Stores,
Baltimore & Ohio Delivery,
Philadelphia.

"On carload shipments arriving in the Warehouse as above mentioned we allow you two days free storage not including the day of arrival, Sundays or Legal Holidays. In other words, there will be no charge whatsoever for the number of crates removed from the Warehouse within the prescribed two days free storage

time, and our storage charge as mentioned above would only apply for the number of crates remaining in the Warehouse after the expiration of the free storage period.

"We can make out of town shipments in any quantity from this warehouse via either the Baltimore & Ohio Railroad or Reading Company, thus eliminating the out-going cartage expense, and all that we require with your shipping orders is bills of lading in triplicate, we will mark or stencil the crates at our expense."

We also quote the following from a letter from the Merchants Warehouse Company, (R. 551), one of the contract warehouse companies to George Steere and Sons, Chicago, Ill., under date of June 22, 1928:

"Replying to your esteemed favor of the 19th, as to storage rates on your Elec. Signs measuring 30"x6" x10", weight about 20 lbs., only one size sign to be shipped in a carload, we are pleased to quote you as follows:

"Storage, 1½¢ per crate each period of 30 days or fraction thereof.

"Labor, 1½¢ per crate (covers unloading car, placing in storage, and delivering either to car or tailboard of truck).

"There would be no charge on orders filed with us before the car is unloaded, and hauled by your customers within 48 hours after the arrival of the car. If not hauled within 48 hours the regular storage and labor rates would apply.

"Our warehouse is served by the Pennsylvania Railroad, enabling us to receive carload lots without cartage or switching expense and to make either carload or L. C. L. shipments without cartage or handling expense."

Those letters propose continuing arrangements between the warehouse companies at Philadelphia and out-

of-town concerns under which the warehouse companies would act as consignee of the carload shipments at Philadelphia and perform all of the activities customarily performed by consignees of carload shipments. They have the side track and warehouse facilities that enable them to perform that service. Further, the warehouse companies, in those letters, offered to perform whatever distribution of the carload shipments that was desired by the out-of-town concern and to act as consignors in reshipping any of the goods which the out-of-town concern desired to have reshipped.

The contract warehouse companies argue that they do not control the routing of shipments. But those letters clearly evince requests of the warehouse companies that the shipments be routed via the lines of the carriers from whom they received allowances coupled with statements that additional charges for trucking would be incurred by the out-of-town concern if it did not route the traffic over the lines of the carriers giving the rebates to the writers of the letters.

The Pennsylvania Warehousing and Safe Deposit Company directed that its name be written on the bill of lading and railroad way-bill as the "care-of" party. But such writings do not alter the fact that the warehouse company was to be the actual consignee of the shipment and that can be demonstrated readily. The traffic is carload traffic and, therefore, the consignor and consignee of the shipments and the transporting carrier, engaged in carload dealings or transactions and not in less-than-carload transactions. The letter shows that the carload lots were to be broken or distributed at the warehouse in Philadelphia, pursuant to the instructions of the consignor, part being delivered within 48 hours following arrival of the cars, part being held in storage, part being trucked to city deliveries and part being shipped from the ware-

house in less-than-carload lots. It is obvious that no receiver of one of the small lots was the consignee of a carload shipment. Those receivers had no dealing with the carrier. The carrier could not deliver any carload shipment to any one of such receivers and rule 23 of its freight classification (R. 567) restrains the carrier from distributing carload shipments in small lots. The only party to whom the carrier could deliver such carload shipments in Philadelphia is the warehouse company and the substance is that the warehouse company is the consignee of those carload shipments. When shipments are billed in care-of the warehouse companies there may be a collective consignee but looking to the substance of the transactions the designation of the warehouse company as the care-of party on the billing does not restrain the warehouse company from acting as the consignee of the shipments in the transaction with the transporting carrier.

Our opponents, centering their argument on the entry of the name of the warehouse company on the bills of lading or railroad billing, assert that the "care-of party" is not the consignor or consignee of the shipments, or the shipper. We submit that the entry of the name of the warehouse companies on the bills of lading or way-bills was an incident of secondary importance and that the underlying and continuing contract, as reflected in the letter, makes the warehouse company the actual consignee of the shipments. The evidence shows that writings incorporated in billing are a mere incident in the transactions or dealings between warehouse companies and users of warehouse service. That is shown clearly in the testimony of the Vice President of the Terminal Warehouse Company, one of the non-contract companies, which we quote here: (R. 283.)

> I heard the stipulation that was made between counsel this morning as to the form of billing of freight

delivered to the Merchants Warehouse Company—there were two forms of billing. As to whether it makes any difference whether the freight is billed in one or the other of the two forms shown in that stipulation, it makes no difference.

"The substance is the same under either of those two forms of billing. When we solicit business from out-of-town concerns the aggregate charge is what gets the business. Our aggregate charge is the same under either form of billing and we perform similar distribution service under either form of billing. The solicitation and the service performed by the subsidized warehouses is the same under either form of billing, and the discrimination against us is not less on a shipment billed in their care, which they distribute, than it would be when billed to any one of those subsidized warehouses as the sole consignee thereof. The name entered on the bills of lading and railroad billing are those that the warehouse company suggests be put on when it contracts to distribute the goods. We can have the consignors bill their shipments to John Doe or Richard Roe, in our care, and those shipments will be delivered at our warehouses, and when we distribute the shipments the services which we render will not differ from the services which we would render if the shipment had been billed to the Terminal Warehouse Company as the sole consignee thereof. We contract to distribute carloads of goods for outside concerns."

This Court has repeatedly held that, in the application of the Interstate Commerce Act, it will go beyond the form of railroad billing to the substance of the commerce or transactions which is controlling. *T. & N. O. R. R.* v. *Sabine Tram Co.*, 227 U. S. 111, 127; *La. R. R. Comm.* v. *T. & P. Ry.*, 229 U. S. 336, 341; *Ill. Cent. R. R.* v. *La. R. R. Comm.*, 236 U. S. 157, 163; *P. R. R.* v. *Clark Coal Co.*, 238 U. S. 456, 466; *B. & O. S. W. R. R. Co.* v. *Settle*, 260 U. S. 166; *Terminal Warehouse Company* v. *United States*, 31 Fed. (2d) 951, 959.

In the letter reproduced above the contract warehouse company, the Philadelphia Warehousing and Safe Deposit Company, directed the consignor at Chicago to name it, the warehouse company, as the "care-of" party on the bills of lading and billing. It is within the power of warehouse companies to have shipments billed in the form and manner which they prefer. (Sullivan, R. 283.) According to the argument of our opponents, allowances or rebates given to "care-of" parties are not unlawful because the "care-of" party is not a shipper. If that argument is sound the contract warehouse company made itself a "care-of" party, immune from statutory restraint of rebating, by merely writing a letter, and it follows that voluntary obedience to the command of the statute is the maximum that can be exacted from this self constituted immune because it can so easily and effectually neutralize the force of the statute. If the writings on billing, instead of substance, is to control application of the Interstate Commerce Act then that statute will lose its mandatory force.

The warehouse companies are rate payers. (Geisz, R. 402; Funck, R. 480; Justice, R. 712-715; Ex. 37, R. 574.) And of course they are at liberty to make any contract or arrangement at any time under which they will be consignors or consignees of shipments or rate payers. They operate warehouses that are in fact large shipping plants and they are public shippers in that they offer and profess to ship, for hire or reward. The contention that these professional shippers are not shippers is self contradictory.

Several classes of concerns that undertake to do the shipping for other parties, as a lawful business, for hire or reward, in well-reasoned court decisions, have been found to be shippers. For example, freight forwarders, *I. C. C.* v. *D. L. & W. R. R. Co.*, 220 U. S. 235; *Great Northern Railway* v. *O'Connor*, 232 U. S. 508. Also a freight

forwarder or customs house broker, *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444. Also warehouse companies, *Terminal Warehouse Company* v. *United States*, 31 Fed. (2d) 951, 958, 959; *McCormick Warehouse Company* v. *Pennsylvania R. Co.*, 148 I. C. C. 299; *Scattergood* v. *Director General*, 60 I. C. C. 155.

In an early case, *United States* v. *Milwaukee Refrigerator T. Co.*, 145 Fed. 1007, Circuit Court, E. D. Wisconsin, petition for an injunction under the Elkins Act, the court said:

> "And if an owner (of goods shipped), having full dominion in all respects, conveys to another the dominion for transportation purposes, that other in all dealings respecting transportation should be deemed the owner and shipper."

These cases come before this Court for review under statutes which forbid the giving of rebates by carriers or their agents and which forbid the receiving of rebates by shippers, agents of shippers and persons acting for shippers. The purpose and intention of the legislative branch to inhibit every person capable of being instrumental in giving or receiving rebates from taking such action is very clearly manifested by the statutes. Nevertheless the contract warehouse companies, the distribution agents of some of the largest manufacturers in the country, are claiming immunity from application of those statutes, under the disguise of the non-shipper argument, which if approved by the Courts or the Commission would enable any warehouse company, freight forwarder, commission merchant and middle-man in the United States to avoid the statutory restraints and become a conduit for the passage of the prohibited rebates. Those selected by the carriers to function as such conduits would be the immunes and their competitors would be the outlaws whose property could

be confiscated or destroyed in the operation of the rebating practice with impunity.

3. The rebates are allowances out of the freight rates on selected traffic of the Contract Warehouse Companies.

The rebates were confined to selected long-haul or remunerative traffic. They were not given on traffic affording only switching revenue to the carrier giving the rebate. (Ex. 1, R. 456, 469-70, 478, 482, 489, 496, 504, 513, 520, 530; Ex. 53, R. 618; Ex. 54, R. 636; Ex. 55, R. 655; Ex. 57, R. 688; Ex. 86, R. 714, 717; Ex. 88, R. 736, 738.)

We cannot transform these various rebates on selected traffic into anything resembling compensation of freight handlers or rent for buildings used as railroad freight stations. A description of the allowances follows:

The Pennsylvania Railroad Company gave allowances to the Merchants Warehouse Company on its inbound and outbound shipments of freight in carload and in less-than carload lots. The rates of those allowances were 3½ cents per barrel and 2½ cents per barrel, respectively, on flour, and 50 cents per ton and 35 cents per ton, respectively, on all other freight. (Funck, R. 442-3; Ex. 7, R. 556).

The Pennsylvania Railroad Company gave allowances of 50 cents per ton to the Quaker City Cold Storage Warehouse Company on its inbound carload shipments of butter, cheese, eggs and dressed poultry. (Davis, R. 247; Ex. 7, R. 556). The Quaker City Cold Storage Company did not contest the Commission's order.

The Baltimore and Ohio Railroad Company gave allowances of 50 cents per ton to the Pennsylvania Warehousing and Safe Deposit Company on its inbound and outbound carload shipments of freight of all kinds. (Justice, R. 400).

Reading Company gave allowances to the Pennsylvania Warehousing and Safe Deposit Company on its inbound carload shipments of freight. The rates of the allowances were 15 cents per ton on newsprint paper and 30 cents per ton on other freight. (Justice, R. 400).

Reading Company also gave allowances to the Philadelphia Warehousing and Cold Storage Company on its inbound carload shipments of freight. The rates of the allowances were 50 cents per ton on such freight requiring cold storage service and 30 cents per ton on such freight not requiring cold storage service. (Gheen, R. 361).

According to the argument of our opponents the warehouses of the Pennsylvania Warehousing and Safe Deposit Company are public freight stations of Reading Company and the Baltimore and Ohio Railroad Company. The alleged rent for the use of those stations paid by the Baltimore and Ohio is an allowance of 50 cents per ton on the inbound and outbound carload traffic from those warehouses. But the alleged rent payable by the Reading Company for identical use is materially different, that is, an allowance of 15 cents per ton on inbound carload shipments of newsprint paper and 30 cents per ton on other inbound carload freight. The Reading did not pay any allowances on shipments outbound from those warehouses. And the services which that warehouse company performed on freight included in shipments outbound via the Baltimore and Ohio were similar to services which it performed on shipments outbound via Reading Company Lines. (Justice, R. 304).

Evidently an allowance on part of the freight handled in a certain building cannot transform that building into a railroad freight station. And our opponents have not attempted to convert such allowances into anything resembling rent for use of a building or facility.

4. The discriminatory effect of the rebates.

Let us point out the effect of the rebates, in unjust discrimination inflicted on the business of the non-contract competitors. A description of the warehouse business presented in the light of railroad rates and freight classification rules, is necessary foundation.

Rates for the transportation of freight in carloads are lower than rates for the transportation of freight in less-than-carload lots. (Sullivan, R. 269; Ex. 39, R. 596). The carriers, in rule 23 of the Consolidated Freight Classification, announce that they will not distribute carloads of freight at destination of shipments in less-than-carload lots and that they will not assemble several small lots into a carload for transportation. The carriers, in rule 14 of that Classification confine their carload service on each shipment to one consignor and one consignee and, in rule 27 of the Classification, the carriers cast upon the shipper the burden and cost of loading carload freight into cars and unloading carload freight. The three classification rules (R. 567, 568) are in harmony with the lower scales of rates applicable to carload traffic and strict enforcement of those classification rules obviously is essential to the preservation of the higher scale of rates on less-than-carload traffic and the lower scale of rates on carload traffic. In fact those three classification rules point out the broad field of business activity for the warehousemen, exempt from railroad competition, enabling the warehouseman to deal in carload traffic and to supplement his storage service by keeping "spot stocks" for manufacturers and wholesalers and by assembling and distributing carload freight. The business of the warehouseman is described in great detail in a publication issued by the United States Department of Commerce. (Ex. No. 18, R. Vol. III).

To summarize. The principal business of the warehouse concerns is voluntary or solicited storage, assembling, distribution and various services incidental thereto. The carriers may be involuntary storers, when compelled to store as an incident to their transportation service but, in view of rule 23 of their Classification, they cannot assemble or distribute carload freight. And the performance by a common carrier of both transportation service and trade service would nullify application of its published rates for the transportation service. *New Haven R. R.* v. *I. C. C.*, 200 U. S. 361.

Our opponents assert that a classification exception to rule 27, the loading and unloading rule, negatives application of that rule at warehouses of the contract warehouse companies. In a later section of this brief we assail the validity of that exception. But no exception to rule 23, the assembling and distribution rule, has been asserted or proved.

The services performed by the contract and non-contract warehouse companies, which we have described generally, and the similarity of the services performed by each of those two groups of warehouse companies were fully proved. We here present reference to the evidence in form admitting ready comparison—

Non-Contract Competitors	
Terminal Warehouse Company	(Sullivan, R. 266-275; Ex. 37-A, R. 574)
James Gallagher	(Gallagher, R. 251-2; Ex. 37-B, R. 577)
Northeastern Warehouse Company	(Foster, R. 218-21; Ex. 37-E, R. 580)
Walter A. Bailey	(Dickson, R. 202-5; Ex. 37-E, R. 581)
Rex & Company, Inc.	(Rex, R. 243-4; Ex. 37-D, R. 582)
Industrial Cold Storage and Warehouse Company	(Mooney, R. 234-7; Ex. 37-F, R. 588)
Summary	(Morgan, R. 296; Ex. 37, R. 572)

CONTRACT WAREHOUSE COMPANIES

Merchants Warehouse Company	(Henry, R. 187-194; Richardson, R. 374-386, R. 548-555)
The Pennsylvania Warehousing & Safe Deposit Company	(Justice, R. 302-5; 398-9; Exs. 42-47)
The Philadelphia Warehousing & Cold Storage Company	(Geisz, R. 309-11, Ex. 50)

The revenues of the warehouse companies arise from that storage, handling, spot stock and distribution service. (Morgan, R. 296). And the traffic or business, requiring transportation by railroad to or from warehouses is the chief source of revenue to the non-contract competitors because other traffic or business, not transported by railroad, would not provide revenue sufficient to pay the warehouse operating expenses. (Foster, R. 218-19; Mooney, R. 234-5; Rex, R. 243; Gallagher, R. 251; Dickson, R. 210; Sullivan, R. 266-7, 274.)

The court below, in the finding of fact numbered 4, (R. 59) found that "no payments are made if the shipments are unloaded within the 48 hours of free time". If that is a finding that the three common carriers did not give allowances to the contract warehouse companies on shipments unloaded from inbound cars within 48 hours following arrival of the cars at the warehouses it appears to be in error. The carriers did not refrain from giving allowances on freight unloaded within that period of 48 hours. But the contract warehouse companies refrained from exacting compensation from their customers, for warehouse handling services, on freight which the contract warehouses delivered or distributed through the warehouses to those customers within 48 hours following the arrival of the inbound cars, containing that freight, at their warehouses in Philadelphia.

The Merchants Warehouse Company performed such distribution services free of charge to its customers and was

compensated, by the allowances, for its performance of the distribution. (R. 193, 194, 241, 242, 377, 550, 551.) Likewise, the Pennsylvania Warehousing and Safe Deposit Company. (R. 399, 400, Ex. 42, R. 596-597.) Likewise, the Philadelphia Cold Storage and Warehousing Company. (Ex. 50, R. 598). Delivery of carload freight by a railroad company, in accordance with rule 14 of the Freight Classification, is delivery of each carload intact to one consignee. Distribution of carload freight differs from the railroad delivery of carload shipments in that distribution involves separation of the carload into smaller lots involving removal of part of the tonnage from the warehouses by trucks within 48 hours, storage of part of the tonnage in the warehouses and removal therefrom later by trucks or reshipment pursuant to withdrawal or delivery orders covering small lots issued by the owners of the freight.

We insist that, under rule 23 of the Classification, railroad transportation of inbound shipments was completed upon placement of the loaded car upon the side tracks of the warehouse companies. That accomplished delivery of the carload shipments. Handlings of the freight following that delivery was distribution which, under rule 23, is trade service. Common carriers cannot perform trade services and the Commission will not authorize allowances to be given as compensation for services, not embraced in common carrier duty, which the carriers cannot perform through use of their own facilities and employees. *Gulf States Steel Co.* v. *Director General*, 66 I. C. C. 255, 258.

The contract warehouse companies refer to the 48 hour free distribution service as competent evidence of their performance of railroad transportation service meriting compensation in the form of the allowances. The testimony of the non-contract warehouse companies is that that free distribution service was one of the inducements,

having exceptionally strong force, used by the contract warehouse companies in diverting trade or business from the non-contract warehouse companies to the contract warehouse companies. Such use is clearly shown in the letters of the contract warehouse companies in which they solicited the patronage of various users of warehouse service. (Ex. 6, R. 549-55; Exs. 42-47, R. opp. 596; Ex. 49, R. Vol. III; Exs. 50, 51, R. opp. 598.)

The 48 hours free distribution service has no foundation other than that it is one of the business practices of the contract warehouse companies. (R. 447, 448). Demurrage rules apply to the detention of railroad cars but not to freight after it is removed from the cars. (R. 448). The freight, when unloaded from the cars was in the custody and possession of the warehouse companies under their contracts and arrangements with the owners of the freight and, of course, the authority of the carriers to apply any rules to that freight ended when they delivered the inbound carload shipments intact on the side tracks at the warehouses.

The controlling fact in the mind of the warehouse customer is the total cost of distribution. That cost is the aggregate of the railroad freight rates and the warehouse charges. The contract warehouse companies, in competitive solicitation of business, had the benefit of freight rates on their traffic that were lower, by the amount of the allowances, than the freight rates on the traffic of their non-contract competitors. The lower freight rates enabled the contract warehouse companies to quote and exact a lower aggregate charge on goods handled through their warehouses than their non-contract competitors, operating under the handicap of higher published rates, could quote or exact.

The discriminatory effect of the rebates is clearly shown by the testimony of the Vice-President of the Terminal Warehouse Company, one of the non-contract competitors, which we quote here. (Sullivan, R. 276).

"Q. Have the allowances been used to divert business from the Terminal Warehouse Company to your subsidized competitors?

A. Yes.

Q. Explain that use of the allowances?

A. There are hundreds of well known concerns that employ warehouses to distribute their products in the eastern cities. We and the subsidized warehouse companies actively compete in soliciting the business of those concerns. Those concerns ship their goods to the warehouse that can offer them the lowest aggregate charge for the distribution of their goods. The aggregate charge is made up of the railroad freight rates to the warehouse and the warehouse charges. Our subsidized competitors are enabled, by the allowances, to quote lower aggregate charges than we can quote and they underbid us and take competitive business away from us."

Seven witnesses for the non-contract competitors testified in substance that their businesses were subjected to injury or damage of three kinds, namely, (1) the contract warehouse companies, in competitive solicitation of business, underbid the non-contract competitors and thereby took certain business away from the non-contract competitors, (2) the competitive business which the non-contract competitors elected to handle was handled by them at "cut rates" imposed by their subsidized competitors with resulting shrinkage or diminution of their normal business profits, and, (3) the non-contract competitors were compelled to surrender to their subsidized competitors the warehouse handling of all flour, heavy density commodities and

most of the inbound freight distributed and delivered promptly after arrival at warehouses. (Dickson, R. 205-210; Foster, R. 222-224; Mooney, R. 235-237; Rex. R. 243; Gallagher, R. 252-253; Sullivan, R. 276-283). And this testimony is fortified by letters from warehouse patrons demanding "cut rates" of the level or measure fixed by the contract warehouse companies. (Exs. 19 to 29, inclusive, R. opp. 562).

The description of the second kind of business or transactions, described in the preceding paragraph, clearly shows actual losses on actual transactions and does not indicate theoretical or speculative damages.

When the non-contract competitors accepted and handled competitive business they incurred the regular expenses incident thereto in the form of investment charges or rents, taxes, cost of maintenance of facilities and cost of labor assignable to the handling of that competitive freight or business through their warehouses. (Dickson, R. 207; Sullivan, R. 278). The competing warehouse companies, subsidized by the rebates, afforded handling and distribution of warehouse freight free of charge. And the rebates enabled them to afford the free service. (Davis, R. 248; Richardson, R. 377; Justice, R. 399). Such free service supported by unlawful rebates undoubtedly reflects a subnormal basis of warehouse rates and charges. The imposition of that subnormal scale of charges upon the non-contract competitors deprived the non-contract competitors of opportunity to exact reasonably compensatory warehouse charges that would yield the revenue needed to pay their investment charges, cost of maintenance, taxes and cost of labor. (Dickson, R. 207; Sullivan, R. 278). The rebates yielded such revenue, or a substantial part of it, for the contract warehouse companies. (Richardson, R. 377; Justice, R. 399). The uncontradicted testimony of the seven witnesses referred to in the preceding paragraphs is that

the non-contract competitors had only the alternative of accepting competitive business at the subnormal rates imposed by their subsidized competitors or surrendering the business to their subsidized competitors. The evidence has established the fact of loss, to the non-contract competitors, resulting from shrinkage of normal charges and revenues accompanied by the regular burden of investment charges, taxes, maintenance expenses and cost of labor which obviously resulted in diminished profits and actual pecuniary loss.

The injury and damage to the business of each of the non-contract competitors was not confined to that part of the warehouse traffic which could be distributed within 48 hours following arrival in inbound cars. They sustained damage on virtually all competitive business. Free distribution of part of the tonnage of a warehouse customer was an inducement sufficient to cause the customer to allot all of his tonnage or business to the contract warehouse company that gave that inducement. (R. 241, 242).

The contention that the non-contract competitors are not shippers and, therefore, are not entitled to protection of the Interstate Commerce Act suggests that there may be parties back of or beyond these warehouse concerns that would complain if there are grounds for complaint. Judge Buffington, in his dissenting opinion in the Court below, (R. 50) stated that no shipper is complaining. The reason that no person, other than the non-contract competitors, is complaining is that no person other than those warehouse companies has been injured or damaged by the rebating practices. When a patron of warehouse companies cannot obtain, in prospective dealings with the non-contract warehouses, rates, charges and terms as low and as favorable as he can obtain from the contract warehouse companies that patron will not deal with the non-contract ware-

house companies but, by allotting his business to the contract warehouse companies he escapes from the discriminatory effect of the rebates and he obtains the benefit of concessions that the preferred warehouse company is enabled, by the rebates, to grant. (Sullivan, R. 277). That is the essence of the unjust discrimination that we complain of—the non-contract competitors must bear the full measure of the damage in the form of loss of business or diminution of normal profits. No one else is injured and, therefore, no other person has grounds for complaint.

These cases undoubtedly are of national importance. In our review of the contracts we point out that the three carriers that gave these rebates are engaged in a struggle, each with the other, to obtain an undue share of the warehouse freight traffic of Philadelphia and that the allowances are rebates used in that traffic-buying contest. The non-contract warehouses are the victims of that unlawful contest. The Department of Commerce aptly described the warehouse business as an industry of national scope. Upwards of ten millions of dollars is invested in the warehouse property of the non-contract warehouses at Philadelphia. And if the non-contract warehouses at Philadelphia are outlaws, in that they are not entitled to the protection of the Interstate Commerce Act, then a great national industry is outlawed. The law involving rebating applicable at Philadelphia also will apply to the warehouse industry throughout the United States and if these carriers can condemn and confiscate that part of the warehouse industry of Philadelphia that suits their selection, by means of the railroad rebate, it follows that the whole warehouse industry of this country can be subjected to similar treatment.

Neither the railroad companies nor the contract warehouse companies attempted to refute the proof of unjust

discrimination. The defense of that unlawful conduct is claimed immunity from application of the statutes which condemn that conduct and special privilege enabling continuance of the unjust discrimination at the will of the perpetrators.

5. The warehouses of the Contract Warehouse Companies are not railroad stations and the allowances are not the equivalent of rent paid by the railroads for use of the warehouses as such stations.

We now turn to the contention that the allowances are the equivalent of rent paid by the carriers for use of warehouses of the contract warehouse companies as public freight stations of the carriers.

We find no evidence of leasing of the warehouses for use as such railroad freight houses, or of actual use for that purpose. The railroads did not commit any of their freight to the contract warehouse companies for handling. All freight handled by those warehouse companies was obtained by them through their own solicitation and advertisments in furtherance of their private business activities. The opposition briefs ignore the mass of uncontradicted evidence which shows that the warehouses of the contract warehouse companies are devoted to the private business activities of those companies. (Henry, R. 186-199; Justice, R. 301-9; Geisz, R. 309-11; Richardson, R. 374-98; Exs. 2, 3, 4, R. 531; Ex. 6, R. 549; Ex. 12, R. 558; Exs. 42-47, R. opp. 596; Ex. 49, R. Vol. III; Exs. 50-51, R. opp. 598). If that private use does not bar public use of those warehouses as railroad freight stations a clear exposition of the possibilities of commingled public and private utilization of the warehouses is essential to the case of our opponents. Such explanation is not at hand.

In *Andrews Brothers Co.* v. *P. R. R. Co.*, 123 I. C. C. 733, 739, the Commission said:

> "A carrier is not required, as part of its transportation service, to furnish warehouse space to all shippers of fruits and vegetables for the unloading, sorting, displaying, auctioneering, and delivery of carload shipments, in less-than-carload lots, to purchasers thereof. That is a trade service."

Turning to proof of the negative, that is, that the warehouses are not public freight stations.

The inbound shipments received at those warehouses were billed, at points of origin of the shipments, "in care-of" those warehouses. (Stipulations of counsel, R. 233, 312, 315). That "care-of" billing covers the solicited warehouse traffic of warehouse companies. (Ex. 6, R. 552, 553. Exs. 42, 50. Sullivan, R. 274, 279). In other words that "care-of" billing shows that the inbound freight received at warehouses of the contract warehouse companies was their solicited warehouse traffic, their private business, and was not traffic committed to those warehouses by the railroads for handling in common carrier service. It follows that there was no public use of the warehouses as freight stations for shipments inbound to Philadelphia.

Representatives of trucking companies, engaged in trucking freight to and from railroad freight stations at Philadelphia for many years, testified that the warehouses of the contract warehouse companies were not railroad freight stations. (Gallagher, R. 424. McLaughlin, R. 434, 435.)

Counsel for the non-contract warehouse companies applied a very practical test with purpose to ascertain whether warehouses of the Merchants Warehouse Company actually functioned as railroad freight stations. He caused two truck loads of goods to be tendered for transportation via the Pennsylvania Railroad, by public truckers, at two of those warehouses and the result was that the employees at those warehouses refused to accept the shipments and

referred the truckers to certain public freight stations of that carrier. (McLaughlin, R. 434-436. Hoover, R. 437-439). Counsel for the Merchants Warehouse Company objected to that evidence on the grounds that its warehouses were public freight stations only for carload freight traffic and not for the smaller quantities, necessarily less than-carload lots, that could be carried and tendered in motor trucks. (R. 436, 438). But the objections are not well-founded because allowances were given by the Pennsylvania Railroad to the Merchants Warehouse Company on its less-than-carload traffic and its carload traffic. (Funck, R. 442). That test proved that those warehouses were not railroad stations.

The telephone directory of Philadelphia, a source of information for shippers, lists the railroad freight stations in that city and the warehouse companies there and does not include the warehouses of the contract warehouse companies in its classification of railroad freight stations. (Sullivan. R. 429, 430). Board signs, visible from certain public streets in Philadelphia, plainly identify the bona-fide railroad freight stations as such. The board signs on the warehouses of the contract warehouse companies identify those structures as private warehouses and not as railroad freight stations. (Morgan, R. 440, 441).

Pamphlets of instructions were issued by the carriers for the guidance of their employees in moving cars to and from warehouses at Philadelphia. (Funck, R. 353-355. Gheen, R. 363. Sands, R. 373. Ex. 100, R. 745, Ex. 101, R. 764, Ex. 102, R. Vol. III). Those pamphlets list the public freight stations of the carriers and the industries served on private side tracks at Philadelphia. The warehouses of the contract warehouse companies and the non-contract warehouse companies are properly listed in those pamphlets not as railroad freight stations but as private indus-

tries served on private side tracks. Those pamphlets, intended for actual use of the railroad employees, undoubtedly portray the truth and are not designed, as are the railroad tariffs which our opponents rely on, to disguise unlawful rebates.

In the dissenting opinon in the Court below it is stated that the Merchants Warehouse Company received as agent from trucks and teams and forwarded over its principal's railroad 744 carloads of outbound freight. (R. 55). The statement evidently is based on the testimony of the general manager of the Merchants Warehouse Company. (R. 452). We are unable to find the evidence which shows that the Merchants Warehouse Company handled any of the 744 carloads as an agent for the railroad company and not in its private capacity as a warehouse company. Adverting to the testimony of the general manager of that Company given in greater detail (R. 374-398), and to the testimony of the Vice-President of the Terminal Warehouse Company, a competing warehouse company not subsidized by any allowances out of freight rates. (R. 269-280, 432). Comparison of the testimony of those two witnesses, describing the business activities of the two warehouse companies, shows that the non-contract warehouse company performs services similar to the services performed by the contract warehouse company and that neither of those companies performs any service embraced in common carrier duty. The testimony of the general manager of the Merchants Warehouse Company does not show that that company acts as a freight agent for the Pennsylvania Railroad Company. On the contrary, the testimony is that that warehouse company, in connection with the forwarding of outbound shipments, instead of assuming to act as such agent, obtains bills of lading from a bona fide agent of the Pennsylvania Railroad Company. (R. 385, 386). The

general manager of the Merchants Warehouse Company also testified that his exhibits 90, 91 and 92, which reflect warehouse distribution of carload shipments, are typical of inbound traffic via the Pennsylvania Railroad handled by the Merchants Warehouse Company. (R. 376-381). When freight classification rule 23, which prohibits distribution of carload freight by railroad agents, is applied to the testimony of the general manager of the Merchants Warehouse Company the proof is that that company did not act for the Pennsylvania Railroad Company and that its freight handling activities were warehouse distribution of carload freight. Exhibit No. 6, (R. 549-555), shows definitely that the freight handling services described by the general manager of the Merchants Warehouse Company were trade services, embraced in the private business activities of that company, not performed for any railroad company.

One of the contract warehouse companies, the Philadelphia Warehousing and Cold Storage Company, has a cold storage plant served on private side tracks connecting with Reading Company Lines. It seeks a finding that its cold storage plant, not used for storage in transit but for sale or merchandising of commodities following transportation of the commodities in carloads to destination, is a public railroad freight station. Another contract company, the Pennsylvania Warehousing and Safe Deposit Company, seeks a finding that a warehouse, which is a humidor used exclusively for tobacco, is a public railroad freight house. Light is excluded from this warehouse and, to maintain the desired humidity, it is virtually air proof. However, the humider warehouse is not equipped with side tracks or other railroad track facilities and, therefore, trucks must be used to move freight to or from this warehouse. (R. 302).

If any evidence in these cases tends to prove that any warehouses of the contract warehouse companies are railroad freight stations that evidence has similar force and weight in proving that the warehouses of the non-contract warehouses are railroad freight stations. The dealings between both groups of warehouses and the railroads are identical. In our judgment all of the warehouses under consideration are devoted exclusively to the merchandising of articles or commodities, preceding or succeeding transportation of the goods by railroad, that is, to trade services, and a finding that allowances out of freight rates can lawfully be given as compensation for any use of their facilities or any services which they perform would seriously impair regulation of common carriers under the Interstate Commerce Act and subject business interests to unjust discrimination and indefensible inconsistency in the application of that Act.

6. The Contract Warehouse Companies did not load freight into Railroad cars or unload cars for the railroad companies.

Now discussing the question—are the allowances compensation of the contract warehouse companies as agents of the carriers employed to load freight into railroad cars and unload freight from cars? There is no evidence of creation of the alleged agency and no evidence that any common carrier committed any of its freight for loading or unloading by any one of the contract warehouse companies.

In the preceding section of our brief we summarized the evidence which conclusively shows that the contract warehouse companies were industries served on private side tracks; that they handled only their own freight there and that they did not handle freight for any common carrier. Virtually all shippers in the United States are com-

pelled by rule 27 of the Consolidated Freight Classification to load and unload their carload freight. When a common carrier singles out that service of a favored shipper as a pretext for giving allowances on the freight traffic of that shipper the resulting allowance is a gratuity, a bounty or a subsidy.

In *Mitchell Coal & Coke Company* v. *Pennsylvania R. R. Co.*, 230 U. S. 247, 261, this Court said:

> "Paying the favored consignee for rendering a service the carrier was not bound to furnish, was a gift —a rebate—a thing *ipso facto* illegal and prohibited by the statute and for which the guilty carrier was subject to criminal indictment." . . .

The brief of opposing counsel (by Messrs. Todd and Olmsted) at page 17 presents the following statements:

> "The carrier could have unloaded the cars with men on its own payrolls hired for the purpose, but it saw fit to hire the warehouse company to do it for them."

The loading and unloading of carload freight on private premises necessarily is trade service. The carriers cannot assign their employees to perform work on the private premises of shippers. Rule 27 of the Freight Classification is the only practicable rule that can be given general application under the circumstances. Loading and unloading carload freight on private premises necessarily is outside common carrier duty. *N. Y. C. R. R.* v. *General Electric Company*, 114 N. E. 115. *General Electric Company* v. *N. Y. C. R. R.*, 14 I. C. C. 237. *Virginia Portland Ry. Co. Case*, 49 I. C. C. 332.

In *United States Cast Iron P. & F. Co.* v. *Director General*, 57 I. C. C. 677, 682, the Commission said:

> "Perhaps the most common, if not the standard, form of delivery for carload freight is the setting of a

car on the so-called team tracks of the carrier, where it may be conveniently unloaded, usually by the consignee. Another common form and a substitute for team track delivery is the switching of a car to the private siding of a consignee whose place of business is contiguous to the trunk line, clear of the main track."

Turning now to the contention that the loading and unloading of freight at warehouses of the contract warehouse companies is similar to a corresponding practice in the loading or unloading of carload freight by the carriers at public freight houses of the carriers where that service is performed in certain exceptional instances. The two services are not similar. If the contract warehouse companies or any other shipper were able to and did use the loading or unloading service at the public stations of the carriers they would be compelled to assume the cost of trucking their freight between their warehouses or places of business and the carriers' freight houses. (Sullivan, R. 431). Warehouse distribution of carload freight cannot be performed in railroad freight houses. (Sullivan, R. 428, 429). In the *Los Angeles Switching Case*, 234 U. S. 294, 311, this Court said that the standard delivery service for carload freight, of common carriers, was placement of the loaded cars on public team tracks or, the equivalent thereof, in the placement of the loaded cars on private sidings. In the cases at bar the contract warehouse companies having had the full measure of delivery service, private side track service, seek more, that is, they want the private side track service supplemented by allowances from the carriers ostensibly to compensate them for loading and unloading their own freight on their private premises.

The analogy drawn by our opponents, as stated in the preceding paragraph, is not well founded. If the business of warehouse companies, representing millions of dollars

of invested capital, could be conducted in the public freight houses of the carriers, under the loading and unloading privilege described, then that privilege might be referred to as being similar to the loading and unloading service performed at warehouses served by private side tracks. The evidence has conclusively established that warehouse service cannot be performed on carrier premises under the loading and unloading privilege described in the preceding paragraph. (Sullivan, R. 428, 429).

Letters of the Merchants Warehouse Company to prospective out-of-town customers, soliciting their business, definitely show that it deemed the service of unloading freight from cars at its warehouses to be shippers' service, and in those letters it specified charges to be paid by the shippers as compensation for the unloading service. (R. 550, 553, 554). Certain of its letters of solicitation offered free unloading service but the fact remains that it is within the power of the contract warehouse companies to collect compensation for the loading and unloading services, which they perform, from their customers. The non-contract warehouse companies are compelled to exact such compensation from their customers or assume the consequences of their failure to do so.

In the dealings between these warehouse companies and the carriers the conditions which attend the loading and unloading of cars at warehouses of the contract warehouse companies are similar to the conditions that attend the loading and unloading of cars at warehouses of the non-contract warehouse companies.

The law will not admit of a finding that loading or unloading cars as performed by the contract warehouse companies is embraced in common carrier duty and is, therefore, compensible by allowances out of freight rates and that identical service, when performed by the non-contract

warehouse companies, is outside common carrier duty and, therefore, a non-compensible trade service. The Interstate Commerce Act deprived common carriers and their officials of authority to give allowances to one and to deny similar allowances to another under the conditions stated. *Union Pacific R. R.* v. *Updike Grain Co.*, 222 U. S. 215, 220. And the command of the statute cannot be set aside by contracts, tariffs or any method of dealing. *New Haven R. R.* v. *I. C. C.*, 200 U. S. 361, 392.

7. The contracts are unlawful agreements under which the carriers bought the large freight traffic of the Contract Warehouse Companies by giving rebates to those Warehouse Companies.

Agreements in writing, herein referred to as contracts, relating to each of the 21 warehouses operated by the contract warehouse companies are in evidence. The contracts are of two classes. Where the carriers owned property which they leased to the contract warehouse companies the contracts are leases with traffic contracts subjoined. Where ownership of property by the carriers was not involved the contracts provide for the performance of services and a traffic agreement also is subjoined.

We have incorporated in Appendix A to this brief a short reference to each of the contracts. These contracts were entered into many years ago and some of them succeeded older contracts. The contracts were entered into by the three defendant carriers, in the proceedings before the Commission, or by their predecessors or underlying companies. In our discussion of the contracts we will use the names of the three defendants as including their subsidiaries and the companies to whose property they succeeded.

The Merchants Warehouse Company operates 10 warehouses. The Pennsylvania Railroad Company owns land and structures included in four of those enterprises and the land under another. The contracts between the Pennsylvania and Merchants are leases with traffic contract subjoined relating to 5 of the warehouses and traffic contracts relating to the 5 other warehouses.

The Pennsylvania Warehousing and Safe Deposit Company operates 10 warehouse enterprises covered by contracts between it and Reading Company, that is, leases with traffic contract subjoined relating to 2 of the warehouses and traffic contracts relating to the 8 other warehouses.

The agreement between the Reading Company and the Philadelphia Cold Storage and Warehouse Company involves transfer of property from the carrier to the warehouse company with traffic contract subjoined.

The Baltimore and Ohio Railroad Company does not own any of the warehouse property used by the Pennsylvania Warehousing and Safe Deposit Company. The contracts between those two companies are traffic agreements.

Carriers may lease their property to shippers if they collect the reasonable market rental value of the leased property. *C. C. C. & S. L. Ry.* v. *Hirsch*, 204 Fed. 849. *Central of Ga. Ry.* v. *Blount*, 238 Fed. 292. We do not challenge the leasing arrangements. But we assail the traffic agreements whether subjoined to the leases or in other form. Our position is that no traffic contracts, other than the uniform bill of lading, are needed for any dealings between the carriers and the contract warehouses relating to the transportation or handling of freight. The uniform bill of lading has sufficed for similar dealings between the non-contract companies and the carriers.

The contract warehouse companies operate warehouses devoted to their private business. Competent evidence of

their performance of public service for the carriers could be produced only by showing separation of their public service, if they perform any, from their private service. The evidence of performance of service, which they adduced, is directed to their private business activities and, therefore, there is total failure to prove performance of service under these contracts. These contracts at most merely express what certain parties agreed to do at a future time. Our opponents assert that they were obligated to load or unload freight for certain carriers. They did not offer any evidence which shows that they loaded or unloaded freight for any carrier. They claim that they were obligated to insure freight. But there is no evidence of any insurance policy or any insurance under that alleged obligation. Likewise, as to all services which the contract warehouse companies assert that they performed for the railroads, they did not submit any evidence tending to prove performance of service. We seem to have a large structure of argument, in the opposition briefs, with no foundation other than writings in contracts and railroad tariffs which have little, if any, force in the absence of proof that the writings resulted in action.

First, discussing the traffic contracts between the Pennsylvania Railroad Company and the Merchants Warehouse Company. One of those contracts, (Ex. 1), entered into on July 1, 1916, has reference to a warehouse at Beach and Laurel Streets, in Philadelphia, operated by the Merchants Warehouse Company. Under that contract the warehouse company undertook:

> "To use all reasonable efforts to secure to the lines of the Pennsylvania Railroad Company's system . . . all traffic controlled by it (the warehouse company) or destined to or from the warehouse aforesaid, and to accord to traffic passing over said lines, at all times,

preference in the facilities furnished by the warehouse company over traffic passing over other lines, it being further understood that without the consent of the railroad company the said facilities shall not be extended to traffic passing over other lines." (R. 497.)

Where, as here, the party or shipper able to control or influence the routing of traffic, by railroad, agrees to confine the use of its fixed facilities to freight traffic transported by a given railroad system that agreement is the most binding traffic routing agreement that any carrier could devise.

Contract provisions of similar purport are in each of the other contracts between the Pennsylvania Railroad and the Merchants Warehouse Company. And the efforts of the Merchants Warehouse Company to influence the routing of freight traffic over Pennsylvania Railroad lines are manifested in its letters of solicitation. (Ex. 6, R. 549-555.)

The shipper being bound as stated let us turn to the binding force exerted on the carrier by the contracts. The contract of January 25, 1917, between the Pennsylvania Railroad and the Merchants Warehouse Company (Ex. 1) does not involve the leasing of property. It is a traffic agreement containing a stipulation of the Pennsylvania Railroad that it—

"will not enter into any contract with any other person or corporation, making any allowance for terminal services in connection with the loading and unloading of merchandise to or from the warehouses located within the City of Philadelphia, nor shall it during the same time engage in the business of warehousing merchandise in the City of Philadelphia, except as hereinafter provided. Provided, however, that this covenant shall not be construed so as to prevent the railroad company from warehousing freight in its terminals as an inci-

dent to delivery thereof or from entering into contracts for storage or other disposition of refused or unclaimed freight, nor shall it be so construed as to interfere with the performance by the Railroad Company of all obligations imposed upon it by law in respect to the carriage, storage or delivery of traffic. Provided, further, that in the event of the Railroad Company building any additional storage warehouses within the City of Philadelphia, either in connection with its freight stations or otherwise, the Warehouse Company shall have the option of renting or leasing such storage warehouse at a fair rental fixed by the Railroad Company within sixty days after the same is offered to it by the Railroad Company; and only in the event of the Warehouse Company not being able or willing to undertake the operation of such warehouse or warehouses, shall the Railroad Company be at liberty to engage in the business of warehousing merchandise in said warehouses . . ." (R. 456-7.)

That covenant deserves careful consideration. One who receives unlawful rebates realizes the maximum advantage therefrom only when he has exclusive enjoyment of the rebates and when his competitors are compelled to compete with him under the disadvantage of the higher published rates. The Pennsylvania Railroad Company, in that agreement, bound itself to give such exclusive advantage to the Merchants Warehouse Company for 20 years. The Merchants Warehouse Company has that great advantage, by virtue of these traffic contracts, in its trade dealings with any large manufacturer or wholesaler in the United States under which it may participate in the marketing of the goods of such manufacturer or wholesaler. A rebate given to the Merchants Warehouse Company is a rebate given to any shipping group which the warehouse company elects to create, or join itself with, and that reflects the great, and unlawful, exclusive privilege and advantage

which exists, and will continue to be utilized, until these unlawful contracts are condemned. Both shipper and carrier are obligated by these contracts to do what the Interstate Commerce Act forbids. Here is the essence of the most pernicious rebating.

The competing railroad system, embracing the Baltimore and Ohio Lines and the Reading Company Lines, competitors of the Pennsylvania Railroad, met this unfair buying of traffic by the Pennsylvania by use of a similar traffic buying scheme and device.

Now turning to the contracts of Reading Company. In the agreement, of January 12, 1897, between the Philadelphia and Reading Railway Company (Reading Company being the successor in interest) and the Pennsylvania Warehousing and Safe Deposit Company (Ex. 53), the warehousing company undertook—

> "to appoint at least one agent who in addition to the general superintendent of the Warehousing Company . . . shall maintain a careful supervision of the operation of the warehouse; shall solicit consignments over the Railway Company's lines to warehouse, by mail and by personal application to local shippers and consignees; and one of whom shall visit western shippers of flour in September and March of each year or more frequently if suggested by the Railway Company and approved by the Warehousing Company for the purpose of securing consignments over the lines of the Railway Company to and through said warehouse." (R. 614-5.)

Adverting to our argument in section 4, *ante*, showing that shrinkage of the aggregate charge was a plan employed by the contract warehouse companies to entice patronage or business from their non-contract competitors. That argument derives additional support from the con-

tracts under discussion. We direct attention to certain provisions of the traffic contract (Ex. 53), wherein the warehouse company subsidized by Reading Company is obligated to meet, in the measure of warehouse charges exacted by it, the level of warehouse charges exacted by warehouse companies subsidized by the Pennsylvania Railroad Company and the Baltimore and Ohio Railroad Company. Those provisions read as follows—

> "To make the consignees or consignors no other or greater charge or charges for services rendered in handling, receiving, storing or shipping merchandise than are charged for the time being by other warehousing companies for similar services upon the lines of the Baltimore & Ohio Railroad in the City of Philadelphia unless the consent of the Railway Company to make higher charges shall be given in writing." . . . (R. 615.)

The contract between the Reading Company and the Philadelphia Warehousing & Cold Storage Company (Ex. 57) contains a similar provision, which we quote here:

> "And it is further understood and agreed that the *WAREHOUSING COMPANY* shall make the consignees or consignors no higher charge for service rendered in handling, receiving, storing or shipping merchandise than are charged for the time being, for similar services, by other railroad warehouses in the City of Philadelphia, unless the consent of the *RAILWAY COMPANY* to make higher charges shall be first given in writing, and that in case it shall at any time be claimed that such consent shall be unreasonably withheld by the *RAILWAY COMPANY*, the matter in dispute shall be determined by arbitrators to be appointed in the manner and with the effect hereinbefore provided." (R. 689.)

The Baltimore & Ohio, in its contract with the Pennsylvania Warehousing and Safe Deposit Company, seems to

have put itself in a position to meet the cutting of rates instituted by its competitors and accomplished by means of the collusive allowance arrangements with contract warehouse companies. In support of that statement we quote the following from the contract, of August 2, 1926, (Ex. 88), showing the undertaking of the Baltimore & Ohio and two of its subsidiaries —

> "the Railroad Companies agree to pay to the Warehousing Company as a terminal allowance for the facilities to be afforded as provided in and by the aforesaid . . . fifty cents . . . per net ton of two thousand . . . pounds for every net ton moved into or out of the Twenty-third Street Stores of the Warehousing Company over the lines of the railroads of the Railroad Companies on which they receive a road haul . . . so long as any other railroad in Philadelphia competitive with the Baltimore & Ohio shall make similar allowance to other warehouse companies in Philadelphia competitive with the Pennsylvania Warehousing and Safe Deposit Company unless sooner estopped from making such allowance by a decision or order of the Interstate Commerce Commission." . . . (R. 736.)

The letter under date of August 2, 1926, in Exhibit No. 88, (R. 737), shows that the Baltimore & Ohio also agreed to give the allowance on freight at other warehouses of the Pennsylvania Warehousing and Safe Deposit Company under the same conditions as those stated in the covenant quoted last above.

These several contracts show the Pennsylvania Railroad as the leader in buying warehouse freight traffic by means of the allowance device and the Reading and Baltimore & Ohio endeavoring to get their shares of that traffic by employing similar devices. The provisions of the contract, quoted last above, evince reluctant engagement in unlaw-

ful conduct with expectation that the Government would discover and restrain the participant from long continued violation of law. Such contracts obviously cannot be construed to reflect arrangements whereby carriers obtained public use of facilities or performance of compensible service.

If the allowances, stipulated in these contracts, were lawful compensation of freight handlers employed to handle freight for the railroad companies of course the alleged compensation would be payable on all of the tonnage handled by the freight handlers. But if the allowances are payable only on the more remunerative line-haul traffic, and not on traffic that earns the smaller switching revenue, then the allowances are revealed as rebates used to buy the traffic of the carriers' selection. We here direct attention to covenants of the contracts that, under that test, establish that the allowances are traffic buying rebates. In the contract between the Pennsylvania Railroad Company and the Merchants Warehouse Company, dated January 25, 1917, (Ex. 1, R. 456), it is provided as follows:

> "except that no payment shall be made upon bulk freight nor upon freight the movement of which by the Railroad Company has been performed at a switching rate, nor upon material and supplies belonging to the Railroad Company."

A similar provision appears in the other Pennsylvania Railroad Company contracts. (Ex. 1, R. 469-70, 478, 482, 489, 496, 504, 513, 520, 530.) Also in the Reading Company contracts. (Ex. 53, R. 618; Ex. 54, R. 636; Ex. 55, R. 655; Ex. 57, R. 688). Also in the Baltimore and Ohio Railroad Company contracts. (Ex. 86, R. 714, 717; Ex. 88, R. 736, 738).

In the briefs of the Merchants Warehouse Company it is asserted that the contracts of that company with the

Pennsylvania Railroad Company obligate the warehouse company to load and unload cars for the railroad company. But we fail to find such obligation expressed in those contracts.

In those contracts the warehouse company ostensibly agreed to—

> "promptly load and unload and handle all freight received by it to be shipped over the lines of the railroad company or received by it for delivery to consignee and in the case of incoming freight to promptly notify the consignees of the arrival thereof." (R. 483.)

And the railroad company agreed to—

> "pay to the said Warehouse Company for all services rendered by it in and about the receipt and delivery of freight, . . . both incoming and outgoing, . . . thirty five (35) cents per ton". . . . (R. 482.)

But the provisions of those contracts do not expressly enable the railroad company to commit any of its freight to the custody of the warehouse company for loading, unloading or handling or to lay down any freight handling or service task to be performed for it by the warehouse company. That omission, in our judgment, reflects design rather than inadvertence. It is definitely established by the evidence that the warehouse company handled only its own freight in furtherance of its private business dealings and, therefore, an allowance given pursuant to the quoted contract conditions was a gratuity or subsidy. The railroad company did not agree to pay for loading or unloading cars, as is asserted by our opponents. According to the contracts, the allowances were given to "pay to said warehouse company for all services rendered by it in and about the receipt and delivery of freight" etc. And the only services rendered by the warehouse company were

warehouse trade services in furtherance of its private business activities. The "pay" provisions of the contract are in harmony with the provisions of one of the published tariffs of the Pennsylvania Railroad Company. (R. 739.) That tariff reads in part as follows:

> "When freight is handled through the warehouse shown below, allowances will be made on inbound and outbound freight by the railroad company to these companies . . . . as follows:"

The name of the Merchants Warehouse Company and a specification of the rates of allowances to be given to it follows the quoted statements. (R. 740-742.)

The contracts and the tariff not only fail to afford support for the assertions that the allowances were given for loading or unloading cars but they definitely show that the allowances were given for another purpose, that is, for all services rendered by the Merchants Warehouse Company in handling freight through its warehouses—distribution of carload freight, a trade service as described in Section 4 *ante*. This distribution also is performed by the non-contract warehouse companies and they are not compensated therefor by the carriers. The allowances are not compensation for a specified service but are a general business subsidy and, like rebates, can be used by the receiver for any purpose.

The records made in claiming and paying the allowances or rebates contradict the assertions that the allowances were compensation for loading or unloading cars, that is, the contract warehouse companies did not claim compensation for loading or unloading cars. The Merchants Warehouse Company claimed sums of money for "terminal charges on cars" etc. (R. 199, 200.) The Pennsylvania Warehousing and Safe Deposit Company made claims for

"to tonnage due at" etc. (R. 314.) The Philadelphia Cold Storage and Warehousing Company made claims for "deliveries made for week" etc. (R. 314, 315.) We submit that if the appellants honestly believed that they were entitled to compensation for loading or unloading cars, under their contracts with the carriers, some of their numerous claims would have reflected that belief.

The contracts ostensibly require the contract warehouse companies to perform various other services for the carriers including (1) assumption of responsibility for payment of freight charges, (2) insuring freight in the warehouses, and (3) notifying consignees of arrival of shipments. In Section 5 *ante*, we gave reference to the evidence which shows that the only freight handled by the contract warehouses was freight which they obtained through their own advertisements and other forms of solicitation. It necessarily follows that any services performed by the contract warehouse companies in handling that freight were services embraced in their trade activities and not performed in the behalf of any common carrier.

The traffic contracts should be condemned for the reason that they contribute to violations of section 2 of the Interstate Commerce Act and section 1 of the Elkins Act. *Armour Packing Company* v. *United States*, 209 U. S. 56, 81; *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, 479.

8. Certain shipping interests prefer continuance of the allowance arrangements and other large shipping interests desire discontinuance of the arrangements.

The Association of Manufacturers Representatives, intervener, and other associations at Philadelphia oppose cancellation of the allowances on the grounds that shippers who use both railroad service and warehouse service will

be compelled to pay increased charges if the allowances are cancelled. However, such cancellation will put the warehouse business of Philadelphia upon the same terms and conditions, additional charges for warehouse service, that the warehouse business of other cities is on now. *Loading and Unloading Carload Freight,* 101 I. C. C. 394, 414. Representatives of those shippers at Philadelphia, in the year 1924, sought to induce the three carriers to give the allowances to all warehouse companies at Philadelphia instead of confining the benefits of the allowances to the contract warehouse companies. (R. 283-285.) The allowances were not given to the other warehouse companies.

On the other hand, certain large shipping interests, the western flour mills, voiced their opposition to the arrangements between the carriers and contract warehouse companies. (R. 254-266.) The western flour mills desire strict enforcement of bill of lading conditions when they ship flour on order-notify bills of lading to Philadelphia, that is, they very properly desire surrender of the bill of lading as a condition precedent to delivery of the carload of flour. But an important part of the business of the contract warehouses is to afford storage for hire and they keep the flour in storage for long periods without requiring surrender of bills of lading. The allowances divert virtually all of the storage, delivery and distribution of flour at Philadelphia to the contract warehouse companies. (R. 255, 282.)

Undoubtedly warehouse facilities are a valuable addition to the various kinds of terminal facilities for handling freight in all large cities. In the absence of the allowances the facilities of all warehouse companies at Philadelphia would be available on equal terms for freight service and, not being agents of the carriers, demurrage rules would compel those companies to unload cars promptly. But the allowance practice curtails the freight terminal service

there as shown in the following testimony of the President of the Millers National Federation. (R. 265.)

> "I said the effect of this arrangement between the railway company and these warehouse companies was to deprive us of the advantage of the rules which are made by the railroad companies to secure the prompt unloading of cars and it, incidentally, results in delay in the payment of the draft or papers which accompany the bill of lading.
>
> Q. What rules do you refer to of the railroad company?
>
> A. I refer to the rules with reference to demurrage, the charges for storage."

Of course, if the warehouse facilities of the contract warehouse companies were needed to augment the freight terminal facilities of the carriers or to expedite the release of railroad cars, the railroad companies would be parties to this proceeding before this Court urging continuance of the contractual and allowance arrangement. The carriers are not urging continuance of the contract arrangement and the proper inference is that cancellation of the allowances will be more beneficial to the carriers and the shipping public than continuance of the allowances.

9. The statutes require that the giving of the rebates be discontinued and the carriers have no alternative course of action.

The contract warehouse companies evidently take the position that the Commission's authority, if properly exercised, is confined to an alternative order which would permit the carriers either to discontinue giving the allowances to the contract warehouse companies or to give the allowances to the contract warehouse companies and simi-

lar or equivalent allowances to all competing warehouse companies at Philadelphia. Our position is that the statutes do not authorize such alternative. If the rebates are unlawful no ruling by the Commission would make them lawful and the giving of such rebates to such additional parties would increase rather than diminish the unlawful conduct of the carriers. In *Penna. R. R. Co.* v. *International Coal Company*, 230 U. S. 184, 206, this Court said that rebates could not be extended to other parties, not even to competing shippers as compensation for their damages.

It may be that such an alternative order of the Commission is customary and proper in many cases of violation of section 3 of the Interstate Commerce Act. Very often violations of section 3 reflect errors of judgment of railroad officials which cannot be avoided in the light of foresight of the railroad officials at the times they formulate and publish rates. But the cases at bar are based on wilful and deliberate violations of section 2 of the Interstate Commerce Act and it may well be said that the milder violations of section 3 are merged in the more serious violations of section 2 which admit of no alternative order.

10. The Commission very properly condemned certain writings in the published tariffs of the railroads.

The Commission, in its report, condemned certain writings in the filed and published tariffs of two of the carriers and, by its order, required those carriers to cancel those tariff provisions. The tariff provisions purported to make the warehouses of the contract warehouse companies public freight stations in the service of the carriers when, in fact, the warehouses were not such public stations. Further, the tariffs relating to the allowances were

in conflict with rules 23 and 27 of the Freight Classification as stated in Section 4 *ante*.

The use of published tariffs to disguise or conceal violations of the Interstate Commerce Act and Elkins Act is a much used device. The practice received attention in several court decisions. *Central R. Co. of N. J.* v. *United States*, 229 Fed. 501, 507, 508; *Pennsylvania Company* v. *United States*, 257 Fed. 261, 263; *Nichols & Cox Lumber Company* v. *United States*, 212 Fed. 588, 592, 593. Also in several reports of the Commission. *McCormick Warehouse Company* v. *Pennsylvania R. R. Co.*, 148 I. C. C. 299; *A. T. & S. F. Ry. Co.* v. *Kansas City Stock Yards Company*, 33 I. C. C. 92; *North Packing & Provision Company* v. *C. M. & St. P. Ry. Co.*, 80 I. C. C. 737, 740; and *Consolidated Southwestern Cases*, 123 I. C. C. 203, 380. In *Central R. Co. of N. J.* v. *United States*, *supra*, the court, C. C. A. 3rd Circuit, stated that notice of certain allowances out of freight rates, had been published in 222 railroad tariffs filed with the Commission. 229 Fed. at 508. Nevertheless, the court concluded that the allowances were unlawful rebates given in violation of the Elkins Act.

Our opponents find support for their position in abortive use of the Jones tariff. (Br. 17.) But our conclusion is that the attempted adaptation is a transparent hoax. We here quote the tariff provision, Pennsylvania Railroad Tariff I. C. C. No. 14322 (R. 696), which the contract warehouse companies rely on—

> "Rule 32. Warehouses Considered Freight Stations During Free Time.—In the application of Storage Rules and Charges as published in Agent B. T. Jones' I. C. C. No. 1491, P. S. C.-Pa.-- No. 86 (Agent's Index No. 54), supplements thereto or reissues thereof, the following warehouses in Philadelphia, Pa., are considered freight stations during the free time:"

Then the warehouses of the Merchants Warehouse Company are named in the tariff. Stated briefly, the Jones tariff, bearing the number I. C. C. 1491, is a bona fide tariff of storage rules and charges which, as designed by its compiler, could not be utilized in furtherance of the rebating scheme. But, in furtherance of the rebating scheme, the railroad giver of the rebates wrote the quoted statements in one of its tariffs, bearing the number I. C. C. 14322, for the sole purpose of converting the Jones tariff into a component of the rebating scheme. The Jones tariff, by express provisions printed therein, applies only on railroad premises and, therefore, has no application on premises of the Merchants Warehouse Company. Further the substance of the Jones tariff is contained in rules which provide for the accrual of storage charges after the expiration of a period of 48 hours free time. When separated from the rules relating to the accrual of storage charges, which is the effect of tariff 14322, the free time rules have no substance or application—they are a vacuum. (Oberg, R. 447-448.) That is all that that tariff provision in tariff 14322 amounts to—a pretense of application of the vacuum at warehouses of the Merchants Warehouse Company. The tariff may be used as foundation for arguing, before a tribunal, that the tariff writing converted warehouses of the Merchants Warehouse Company into public freight stations in railroad service during an alleged free time and that these chameleons changed or shifted to private use at other times. But when only free time rules and no revenue rules are applicable the tariff is a hoax. On railroad premises both free time and revenue rules apply but on premises of the warehouse company only free time is applicable. The question as to whether certain buildings or facilities are, or are not, public freight stations is a question of fact that calls for better evidence than cunningly devised writings in a railroad tariff. In Section

4, *ante*, we pointed out that free distribution of carload freight, within the 48 hour period, was one of the most forceful inducements used by the contract warehouse companies in enticing business from their non-contract competitors. Here we have evidence of specially designed preferential tariff writings having no use or purpose other than deception.

Turning to another of the device tariff provisions which we reproduce here.

Pennsylvania Railroad Company tariff G. O.-I. C. C. No. 14400, reads in part as follows:

> "When freight is handled through the warehouse shown below, allowances will be made on inbound and outbound freight by the railroad company to these companies . . . as follows:"

The name of the Merchants Warehouse Company was "shown below" in that tariff and the rates of the allowances also were specified. (Ex. 98, R. 739.)

That tariff provision does not reflect compliance with the carriers' tariff publishing duty as prescribed in section 6 of the Interstate Commerce Act. The prescribed duty is to describe the service and specify the rates applicable for transportation service performed by the publishing carrier from one point to another point. In the quoted tariff provision the carrier did not specify any service that it offered to perform or any rates that it would exact for such service. It announced that it would pay certain allowances out of its freight rates, etc., when the named shipper handled freight through the shipper's warehouses. The substance would be the same if the tariff provision read—the publisher of this tariff will pay certain rebates to the Merchants Warehouse Company on each 100 pounds of merchandise which the warehouse company ships outbound or causes to be shipped inbound over the railway lines of

the publisher. The sole beneficiary of the rebate is named in the tariff. That writing is not a bona fide provision of a tariff. It is notice of purpose to give rebates.

Pennsylvania Railroad tariff G. O.-I. C. C. 14700 (Ex. 59, R. 693), contains writings to the effect that certain of that carrier's public freight stations at Philadelphia—

> "include facilities of the Merchants Warehouse Company"

That writing obviously would not convey very much information to a shipper. It would inform him that freight station privileges of certain Pennsylvania Railroad freight houses were enlarged or extended to embrace the freight traffic of the Merchants Warehouse Company. Private use of a building necessarily will bar public use of it.

11. The District Court erred in staying and suspending the Commission's order of December 28, 1929, pending appeal to and determination of the appeal by this Court.

On the cross-appeal the Government, the Commission and the non-contract warehouses have assigned as error the action of the District Court, (R. 92), in staying and suspending the order of the Commission dated December 28, 1929, pending determination of the appeal by this Court.

A question, similar to the one raised by this cross-appeal, was involved in the case of *United States et al.* v. *Virginian Railway Company*, 272 U. S. 658, where this Court held that the action of the District Court in suspending the order pending the appeal was unwarranted.

In granting this stay the District Court completely ignored the fact that none of the railroad companies, which commit the unlawful discrimination, prejudice and preference condemned by the Commission, and which were the

only defendants before the Commission and the only parties to whom the Commission's order was directed, appealed from the Commission's order or were made parties in the District Court. To the contrary there is every reason to believe that the railroad companies would have acquiesced in the Commission's order and have ceased and abstained from publishing or making the allowances to the contract warehouse companies which were condemned by the Commission.

The contract warehouse companies and the railroad companies well knew that the operation of the contracts was of doubtful legality. They, therefore, provided for discontinuance of the rebating upon discovery and condemnation by the Commission. Thus in the agreement between The Baltimore and Ohio Railroad Company, et al., and The Pennsylvania Warehousing and Safe Deposit Company, dated August 2, 1926, it is provided:

> "3. . . . , the Railroad Companies agree to pay to the Warehousing Company as a terminal allowance for the facilities to be afforded as provided in and by the aforesaid agreements, fifty cents ($.50) per net ton of two thousand (2,000) pounds for every net ton moved into or out of the Twenty-third Street Stores of the Warehousing Company over the lines of the railroads of the Railroad Companies on which they receive a road haul instead of the thirty-five cents ($.35) per net ton as in said agreements mentioned so long as any other railroad in Philadelphia competitive with the Baltimore & Ohio, shall make similar allowance to other Warehouse Companies in Philadelphia competitive with the Pennsylvania Warehousing & Safe Deposit Co. unless sooner estopped from making such allowance by a decision or order of the Interstate Commerce Commission, the Public Service Commission of Pennsylvania, Court of Competent Jurisdiction or by law." (Ex. 88, R. 736.)

And in the agreement between The Pennsylvania Railroad Company and the Merchants' Warehouse Company, dated July 28, 1927, it is provided:

> First: . . .
>
> "(b) . . . provided, however, that the Railroad Company shall have the right to cancel or abrogate this agreement and/or the payment of allowances provided for in this paragraph in the event such action is authorized, permitted or required by any order, decision, or law hereafter made, rendered or enacted by any State or Federal tribunal of competent jurisdiction, or in the event that these payments of allowances are held by any such tribunal to create undue preference or undue prejudice, upon such notice to the Warehouse Company in writing of its intention so to do as may be necessary to enable the Railroad Company to comply with such order, decision or law; . . . ." (Ex. 1, R. 463.)

These contract provisions evince the doubts that were in the minds of the makers of the contracts at the times the contracts were entered into, and show that the parties to the contracts expected discontinuance of the rebating upon discovery thereof, and we may, therefore, assume that they were prepared for such discontinuance at that time. Thus there is no ground for assertion of irreparable injury, the necessary foundation for such temporary stay.

The District Court should have compelled immediate discontinuance of the rebating, and refused to enter the restraining order. Then if its decision was reversed by this Court the contract warehouse companies could have compiled and presented their monthly bills for their contract allowances to the railroad companies and obtained payment in full. The contract warehouse companies could not possibly have suffered any damages which could not be fully measured and collected by them in the event this

Court reversed the District Court. That stay and suspension did not compel the three common carriers to continue giving the rebates. The carriers, of course, could discontinue the rebating at any time without disobeying the order of the Commission or the order of the Court below granting the stay. But the stay, coupled with voluntary action of the carriers in continuing the rebating, deprived the non-contract warehouses of the benefit of application of the Commission's order which would have stopped the rebating and resulting unjust discrimination.

The temporary stay subjects the non-contract competitors to irreparable injury, while denial of the temporary stay would not damage the contract warehouse companies. The non-contract competitors can recover no damages at all from the contract warehouse companies, but only from the railroad companies, and from them they can recover only compensatory damages.

Furthermore, in this case, the railroad companies not being parties below, the District Court neither did nor could require them to give bond to indemnify the non-contract competitors for the damages suffered while the appeals are under consideration by this Court.

The District Court found (R. 63), as did the Commission (R. 150), that the contracts in question for the payment of the allowances are devices to attempt to lend legality to the payment of rebates to the contract warehouse companies, and further, (R. 63), that the allowances paid to the contract warehouse companies are unlawful as rebates.

Rebating by railroad companies is an offense against the public,—a misdemeanor under the provisions of Section 2 and Section 10 of the Interstate Commerce Act, and a misdemeanor or felony under the provisions of Section 1 of the Elkins Act. *Wight* v. *U. S.*, 167 U. S. 512; *N. Y. C. R. R.* v. *U. S.*, 209 U. S. 56.

Section 3 of the Elkins Act provides for action by injunction, an exceptional remedy in criminal cases, to stop rebating immediately upon discovery of the unlawful conduct, leaving the burden of appeal on the participants in the rebating.

The stay, granted by the District Court, effects the very antithesis of the policy and plan of Congress, that is, the stay contemplates continuance of the rebating during this litigation, although Congress in Section 3 of the Elkins Act, has decreed stoppage of the rebating during the period of litigation.

The District Court also overlooked the fact that no one has lawful title to a rebate,—hence discontinuance of rebating never founds irreparable injury.

In view of the safeguards provided in the Urgent Deficiencies Act, and the expedition provided for by that Act which this Court has scrupulously enforced from the beginning by repeatedly granting motions to advance in cases arising under that Act, and in view of the injunctive relief provided by Section 3 of the Elkins Act to promptly stop rebating, and especially in view of the irreparable damage which is being inflicted upon the non-contract competitors by the continuance of the rebating, it is respectfully submitted that the power exercised by the District Court was not only not authorized by law but was an abuse of discretion committed after full and final hearing in which the merits of the case were adjudged against the contract warehouse companies.

12. Cases, cited by the Contract Warehouse Companies, distinguished.

It seems that the several cases cited by our opponents cannot prevail against *Lehigh Valley R. R. Co.* v. *United*

States, 243 U. S. 444. That case alone requires condemnation of the allowances in the cases at hand.

These rebates were condemned in the report of the Commission, Division 3, 160 I. C. C. 563, decided December 28, 1929, (R. 143.) No dissent. That report was affirmed by the whole Commission on February 10, 1930. (R. 177-8.) And there was no dissent. Similar rebates to warehouse companies were condemned in the report of the Commission, Division 4, in *McCormick Warehouse Company* v. *Penna. R. R. Co.,* 148 I. C. C. 299, decided November 22, 1928, without dissent, and that report was sustained by the Statutory Court in *Terminal Warehouse Company* v. *United States,* 31 Fed. (2d) 951, decided April 10, 1929, also without dissent. It seems that in the light of these unanimous decisions that rebates, of the kind under consideration, have been thoroughly condemned. It is noticeable that the contract warehouse companies have made very little effort to avoid or distinguish these cases that stand against their contentions.

Under Freight Classification rule 27 the loading and unloading of carload freight is shippers', not carriers', service. According to the evidence allowances as high as 50 cents per ton have been given ostensibly as compensation for that service. Possibly a rebate of 50 cents a ton is sufficient to make or break the business of the largest shippers. Our opponents insist that it is within the discretion of railroad officials to select the shipper service that they will convert into compensible service and to select the party to receive the compensation. Then our opponents cite cases in support of their assertion that the party so selected is entitled to the exclusive benefits of the compensation because carriers have a right to select their own agents. (Br. 8.) That is assertation of complete negation of the will of Congress as reflected in sections 2 and 3 of

the Interstate Commerce Act and section 1 of the Elkins Act. Under that theory compliance with those sections of the statute is merely voluntary and the carriers can avoid the statutory restraint at will. If the theory is sound there is no limit to the size of the rebate, if 50 cents will not break the competing shipper the theory will admit of increase of the rebates to $1 or $5 per ton. However, the cases cited by the contract warehouse companies do not support this theory.

In *United States* v. *Baltimore & Ohio R. R. Co.*, 231 U. S. 274, herein referred to as the *Arbuckle Case*, this Court approved the giving of allowances, by the several trunk line railroads that directly serve New York Harbor, to Arbuckle Brothers and the denial of similar allowances to the Federal Sugar Refining Company, a competitor of Arbuckle Brothers. That case shows that Arbuckle Brothers transported freight, including its own shipments of sugar and coffee, by means of lighters or car floats between Jay Street Terminal, a public freight station of the trunk lines at Brooklyn, N. Y., and the separate rail terminals of the several trunk lines on the New Jersey Shore at New York Harbor. Arbuckle Brothers also devoted the use of certain of its buildings and facilities in Brooklyn to ordinary railroad freight station activities in the service of the several trunk lines. The allowances were compensation for that marine service and freight station service. The Franklin Sugar Refining Company, invoking Section 3 of the Interstate Commerce Act, sought similar allowances as compensation for lightering its shipments of sugar from its refinery at Yonkers, N. Y., to the same rail terminals of the several trunk lines on the New Jersey Shore.

The facts in the cases in hand differ materially from the facts in the *Arbuckle Case*. Arbuckle Brothers devoted certain of its buildings, facilities and marine equipment to the public service of the carriers and performed both

freight station service and marine transportation for the carriers. 231 U. S. 282-284. The public station facilities of Arbuckle Brothers and its refinery were not in the same building. 231 U. S. 282, 290. One-third of the freight traffic handled through Arbuckle's freight station facilities was Arbuckle's shipments of sugar and coffee and two-thirds of that traffic was the traffic of others, that is, of the general shipping public. 231 U. S. 290. In the *Arbuckle Case* the allowances were paid in like measure by each of the several trunk line carriers which precludes the suggestion that any one of those carriers sought to buy Arbuckle Brothers' traffic by means of allowances out of freight rates on Arbuckle's traffic. In the cases at-bar all of the traffic handled through the warehouses of the contract warehouse companies was their traffic and the use of the warehouses was confied to the private business activities of those companies. The railroad companies, in rules 23 and 27 of their freight classification, professed not to perform the services for which the contract warehouse companies claim compensation in the form of the allowances under consideration here. In the cases in hand the Pennsylvania Railroad Company, through contracts and allowances or rebates, sought and obtained the exclusive privilege of transporting the freight traffic of the Merchants Warehouse Company. The competing railroad systems, Baltimore and Ohio—Reading, in like manner obtained similar exclusive traffic privileges with other warehouse companies. The result is a rebating arrangement of the Pennsylvania System with its warehouse ally opposed or met by a similar rebating arrangement of the Baltimore and Ohio and Reading Systems with their warehouse allies. Each of those competing railroad systems used its rebating arrangement to obtain an undue share of the warehouse traffic of Philadelphia. Possibly the facts would be more accurately stated if we said that the effort

of the Baltimore and Ohio was directed to retaining its fair share of the warehouse freight traffic against the unfair encroachment of the Pennsylvania System. The Pennsylvania did not give rebates to the Baltimore and Ohio allies and the Baltimore and Ohio did not give rebates to the Pennsylvania ally. The foregoing statements present an allowance or rebating practice in the case at bar differing materially from the allowances by each of the several trunk lines to Arbuckle Brothers which obviously could not result in any one of the competing trunk lines obtaining an undue share of the Arbuckle traffic. This Court subjected the contracts and allowances in the *Arbuckle Case* to a test which revealed good faith and not a cover for a fraudulent scheme to give rebates or other illegal advantage. 231 U. S. 291. A similar test, applied in the cases at bar, will disclose fraudulent scheme and the giving of unlawful rebates with resulting unjust discrimination. Further, this Court in the *Arbuckle Case* found that the services performed by the Franklin Sugar Refining Company were accessorial services, performed for the convenience of that company, for which the railroads were under no obligation to pay compensation. 231 U. S. 287. Adverting to rules 23 and 27 of the Freight Classification we submit that that conclusion applies with greater force to the allowances and alleged services under consideration in the cases in hand.

In *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, this Court approved the giving of allowances to an operator of grain elevators for elevating bulk grain at Omaha. Part of the tonnage elevated was owned by that operator and part of the tonnage was owned by other shippers. The allowances reviewed in that case were allowances to owners of property transported, as authorized in section 15 (13) of the Interstate Commerce Act. The contract warehouses assert that they do not own the freight which they handle and that they are not shippers. The

allowances received by our opponents, according to their argument, are not such section 15 (13) allowances but are compensation of railroad agents, that is, compensation for services performed by our opponents when they were acting as railroad agents and compensation for railroad use of their facilities. Our opponents cannot cite the *Diffenbaugh Case* to their advantage in preserving their exclusive right to such allowances and barring their non-subsidized competitors from receiving equivalent allowances. This Court and the Commission have held that when carriers give section 15 (13) allowances to one or more owners of property transported they cannot deny the equivalent in allowances for similar services to competing owners. *Union Pacific R. R.* v. *Updike Grain Company*, 222 U. S. 215. *Suffern Grain Co.* v. *Illinois Central R. R. Co.*, 22 I. C. C. 178.

While conceding that the unjust discrimination in the cases in hand could be abated through giving allowances to us similar to the allowances given to our subsidized competitors we have an abiding conviction that all such allowances are and would be unlawful rebates. The attempt to remove the unjust discrimination by giving such allowances to other shippers would be ineffectual unless and until railroad revenues were seriously impaired by the giving of similar allowances to compensate every shipper for loading or unloading his carload freight on his private side tracks and premises.

In the cases at bar allowances were not given on bulk commodities, this being shown in the parts of the contracts quoted in sections 3 and 7, ante.

Elevation of bulk grain requires the use of valuable facilities, machinery and power. Elevation is expressly made common carrier service by section 1(3) of the Interstate Commerce Act. Before mere manual labor performed in

loading or unloading the ordinary package freight handled by warehouse companies, on private premises of shippers, is made a common carrier service, compensible by allowances out of freight rates, that important matter deserves the consideration of Congressional committees and the Interstate Commerce Commission. The allowances approved in the *Diffenbaugh* case were applied to bulk grain in transit at an important transit point and not to grain in sacks at points of destination. As to the services alleged to have been performed in the cases in hand, the loading preceded the tendering of the shipments for transportation and the unloading succeeded transportation and delivery of the carload shipments on side tracks of the warehouses at destination of shipments.

In *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444, 446, this Court expressed the view that the *Diffenbaugh* case goes to the verge of what is permitted by the Interstate Commerce Act. Our opponents go much farther.

Coming now to the several cases cited by the contract warehouse companies in support of their assertion that carriers may select and appoint their agents and that they cannot be compelled to appoint others to act as such agents. That question, interpolated by our opponents, is not involved in this case. Not one of the non-contract warehouse companies has manifested desire to be agent of any common carrier. However, the cases cited in support of that extraneous question are easily distinguished. A railroad corporation can act in its private character as owner of property or its public character as a common carrier. The non-contract warehouse companies challenged the action of three railroad corporations in their capacity as common carriers involving transportation of freight and application of their published rates, to which the Interstate Commerce Act, which we invoked, applies. Our opponents

cite cases involving railroad corporations challenged as owners of property under statutes and ordinances, other than the Interstate Commerce Act, which do not involve freight rates and do not shed light on any principle involved in the cases at bar. Among the cases so cited are—*The Express Cases*, (1885), 117 U. S. 1; *Chicago, etc. R. Co.* v. *Pullman Car Co.*, (1891), 139 U. S. 79; *Donovan* v. *Pennsylvania Co.*, (1905), 199 U. S. 279; *Delaware, L. & W. R. R. Co.* v. *Morristown*, (1928), 276 U. S. 182; *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.*, (1928), 276 U. S. 518.

A person, complaining in his status as a property owner, against alleged unfair practices of a railroad company acting as a property owner cannot obtain relief under sections 2 and 3 of the Interstate Commerce Act because those sections are largely directed to transportation service and rates and are not intended to afford relief to property owners as such. *Pittwood* v. *Northern Pacific Ry. Co.*, 51 I. C. C. 535. But where a railroad company, as owner of land, leases or rents that land to a shipper at rent lower than the reasonable market rental value of the land, with purpose to offset and thereby reduce its rates for the transportation of the goods of that shipper below the published standard, that conduct is in violation of section 2 of the Interstate Commerce Act and section 1 of the Elkins Act. *C. C. C. & St. L. Ry.* v. *Hirsch*, 204 Fed. 849. The warehouse companies at Philadelphia, both contract and non-contract, and large manufacturers and wholesalers combine into shipping groups with purpose to ship goods in carload lots by railroad from points of manufacture or concentration to Philadelphia to be marketed there. The material effect of the freight rates, altered by the allowances, in barring or curtailing participation of the non-contract warehouse companies in these shipping groups

and their shipping activities has been stated and the facts clearly distinguish the cases at bar, which involve transportation service and rates, from cases involving only the rights and duties of railroad companies in their capacity as owners of property.

The St. Louis Terminal Case, 34 I. C. C. 453, is cited. In that case the Commission condemned special privilege and found that warehousemen are shippers. P. 462, 465. That case, as shown at page 462, turned largely on the decisions of this Court in the *Arbuckle* and *Diffenbaugh* cases which we reviewed in detail above.

Covington Stock Yards Co. v. *Keith* (1890), 139 U. S. 128, and *Western Stock Yards* v. *N. Y. Co. R. R. Co.*, 87 I. C. C. 4, have reference to the loading and unloading of live stock which requires pens etc., that is, costly facilities not needed or used in the loading or unloading of the package freight involved in the cases at bar. Section 15 (5) of the Interstate Commerce Act imposes special duties, in respect of loading and unloading of live stock, on the carriers and specifically provides that the compensation of the carriers for such loading and unloading services shall be included in their transportation rates. When the Congress, by express statutory provisions, dealt with elevation and with the loading and unloading of live stock that, as it seems to us, indicates that the loading and unloading of ordinary carload freight on private side tracks remains outside common carrier duty and is a trade service.

The cases at bar involve wilful and deliberate rebating based on traffic-buying contracts. In that respect they are easily distinguished from each of the cases cited by the contract warehouse companies.

CONCLUSION.

This Court in its recent decision in the private car case, in *Louisville & N. R. Co.* v. *United States,* decided February 25, 1931, said:

> "The legislative history of the Interstate Commerce Act shows clearly that the evil of discrimination was the principal thing aimed at. . . . This Court has said that the language of the Act is certainly sweeping enough to embrace all the discrimination of the sort described which it is within the power of Congress to condemn."

The inherent vices of the railroad rebate which lead to condemnation of rebating under English and American statutes were clearly stated by this Court in *New Haven Railroad* v. *Interstate Commerce Commission,* 200 U. S. 361, at 391-395. The natural effect of the railroad rebate in monopolizing a given kind of trade or industry in the hands of the participants in the rebating is shown in that case. That effect or result is definitely evinced in the record in the cases at bar. And large amounts of the revenues of three common carriers have been dissipated for many years in this wasteful and unlawful buying of warehouse traffic at Philadelphia. Such dissipation of railroad revenues by the giving of allowances out of freight rates was condemned by the Commission seventeen years ago. *The Five Percent Case,* 31 I. C. C. 351, 408.

If the conduct and practices described in the cases at hand were sanctioned either by the courts or the Commission then, in our judgment, enforcement of the Interstate Commerce Act, and the Elkins Act in the future will be as ineffectual as enforcement of the Volstead Act is reputed to be. And this at a time when the President of the United

States demands more effectual enforcement of Federal statutes.

For the reasons above set forth the judgment of the court below condemning the substantive offenses should be affirmed, and the appeal of the contract warehouse companies from that judgment, in cases Nos. 635, 636, 638, 639, 641 and 642, should be dismissed; and the order of the court below granting a temporary stay of the order of the Commission should be reversed, and the cross-appeal of the United States, the Interstate Commerce Commission, and the non-contract competitors from that order, in cases Nos. 637, 640 and 643, should be sustained.

Respectfully submitted,

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APPENDIX A.

Contracts of Pennsylvania Railroad Company,

Warehouses operated by Merchants Warehouse Company. (R. 570.). Served on private sidings connecting with lines of the Pennsylvania Railroad Company. (R. 570, 745-763.)

Names of Warehouses	*Railroad Ownership*	*Dates of Contracts*	*Record Reference*
Federal Stores	Note 1	July 3, 1918	485-493
Kensington Stores	Note 1	July 1, 1916	502-510
15th and Carpenter St. Strs.	Note 1	July 1, 1916	510-518
31st and Chestnut St. Strs.	Note 1	July 1, 1916	518-526
Shackamaxon Stores	Note 2	July 1, 1916	494-502
River Front Stores		Jan. 25, 1917	455-461
Webb Warehouse		Jan. 25, 1917	455-461
Franklin Stores		Jan. 28, 1927	462-467
Bainbridge Stores		Apr 10, 1922	467-477
Kenilworth Stores		Mar. 4, 1925	477-485

Notes

Note 1—The grounds, buildings and side tracks are owned by the Pennsylvania Railroad Company, or one of its subsidiary companies. (Richardson, R. 391.) Also stated in the contracts.

Note 2—The ground underlying the warehouse and the side tracks is owned by the Pennsylvania Railroad Company or one of its subsidiary companies. (Richardson, R. 391.) Also stated in the contracts.

Contracts of the Reading Company,

Warehouses operated by the Pennsylvania Warehousing & Safe Deposit Company. (R. 570.) Served by private sidings connecting with the lines of the Reading Company. (R. 570.)

Names of Warehouses	*Railroad Ownership*	*Dates of Contracts*	*Record Reference*
16th St. Stores	Note 3	Jan. 12,1897	603-638
		Jan. 31, 1908	708-709
		Dec. 12. 1909	
Port Richmond Stores	Note 3	Jan. 2, 1902	639-663
Delaware Ave Stores 1, 2, 3, and 4		July 9, 1898	622-623
Tobacco Warehouse		July 9, 1898	622-623
West Indies Stores		July 9, 1898	622-623
Pennsylvania Stores		July 9, 1898	622-623
Atlantic Stores		July 9, 1898	622-623
Moro Phillips Stores		July 9, 1898	622-623
Poplar St. Stores		July 9, 1898	622-623

Notes

Note 3.—The ground, buildings and side tracks are owned by the Reading Company, as stated in the contracts.

CONTRACT OF THE READING COMPANY,

Warehouse operated by the Philadelphia Warehousing and Cold Storage Company. (R. 570, 764-774.) Private sidings connecting with the lines of the Reading Company.

Name of Warehouse	*Railroad Ownership*	*Dates of Contracts*	*Record Reference*
Delaware Ave and Noble St.	Note 1	Nov. 4, 1898 Apr. 20, 1909	664-692

Notes

Note 1.—The Reading Company owns the land underlying a portion of this group of cold storage warehouses.

CONTRACTS OF THE BALTIMORE AND OHIO RAILROAD COMPANY, Warehouses operated by the Pennsylvania Warehousing and Safe Deposit Co. (R. 570.) Served by private sidings connecting with the lines of the Reading Company and Philadelphia Belt Line Railroad. (Ex. 102, pp. 79-85.)

Names of Warehouses	*Railroad Ownership*	*Dates of Contracts*	*Record Reference*
23rd St. Stores		Apr. 10, 1897 Mar. 31, 1902 Aug. 22, 1904 Aug. 2, 1926	711-730 734-739
Delaware Ave Stores 1, 2, 3, and 4		July 1, 1911	730-733
Tobacco Warehouse		July 1, 1911	730-733
West Indies Stores		July 1, 1911	730-733
Pennsylvania Stores		July 1, 1911	730-733
Atlantic Stores		July 1, 1911	730-733
Moro Phillips Stores		July 1, 1911	730-733